UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.508
29 July 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 508th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 14 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.93 87878 5832E

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Distr.: 6 August 1993

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Articles 15 bis and 36 bis (continued)

1. Mr. PEREZNIETO CASTRO (Mexico) supported the proposal by the Inter-American Development Bank as restricted tendering would thereby be treated as a method of procurement in chapter II and not buried in chapter III among the tendering proceedings. With regard to article 15 bis, he proposed that paragraphs (b), (c) and (d) be replaced by a new paragraph (b) reading as follows: "the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured". That wording was derived from paragraph 3 of the commentary on article 18 in the draft Guide to Enactment (document A/CN.9/375).

2. With regard to article 36 bis, he proposed the deletion of ", except that publicity requirements shall not apply".

3. Mr. WALLACE (United States of America) said that - like the representatives of Canada and the United Kingdom and the observer for Australia, who had expressed their views towards the end of the previous meeting - he had doubts about the advisability of introducing two articles on restricted tendering; one should not give it unwarranted publicity. He would have preferred to make the provisions of article 18 (3) more stringent.

4. If it was the wish of the Commission to adopt the proposed articles, however, he would support the Mexican representative's proposal for amending article 15 bis and reserve the right to propose additional changes in that article.

5. He agreed that the reference to publicity requirements in article 36 bis should be deleted, although it should be made clear that the aim of the deletion was to remove the need for advance publicity as opposed to ex post facto publicity.

6. Mr. PARRA PEREZ (Observer for Venezuela), expressing strong support for the proposal of the Inter-American Development Bank, said that in Latin America restricted tendering was widely used as a procurement method intermediate between single-source procurement and totally open tendering.

7. If the Model Law did not provide for restricted tendering, it was possible that Latin American countries would resort increasingly to single-source procurement. The proposal of the Inter-American Development Bank would therefore promote - rather than inhibit - competition and freedom of trade.

8. The proposals just made by the Mexican representative would have to be studied. Meanwhile, he felt that in paragraph (d) of article 15 bis the words "for small quantities" should be changed to something like "of low value".

9. Ms. PIAGGI-VANOSSI (Argentina) said that the possibility that the procuring entity would resort to restricted tendering should be reduced as far as possible. She therefore supported the proposals made by the representative of Mexico, and particularly the deletion of the last phrase of article 36, for publicity should be as wide as possible in cases of restricted procurement.

10. Mr. SHIMIZU (Japan), also supporting the Mexican proposal to delete the last phrase of article 36, referred to the suggestion made by the Japanese Government regarding article 18 in document A/CN.9/376/Add.2 and said that publicity was particularly important in the case of restricted tendering; people had access to the record, but only after the event. He would therefore favour the publication of some kind of notice in an official gazette or a similar journal, it being understood that the notice would not be published too late to be of anything but historical interest.

11. With regard to the burden on the procuring entity resulting from publicity requirements, he associated himself with what the United States representative had said at an earlier meeting about such burdens being in the interests of transparency.

12. Mr. GRIFFITH (Observer for Australia) expressed misgivings about the proposed introduction of two new articles into the Model Law at such an advanced stage in the Commission's examination of the draft. There might not be sufficient time to reflect on the consequences of introducing the two articles, and the Commission might afterwards find that it had made a mistake.

13. As there were already provisions in the draft covering restricted tendering, the Commission should try to adapt them to what it considered necessary with a minimum of change.

14. Mr. JAMES (United Kingdom) expressed concern that the discussion appeared to be developing into a debate between countries where restricted tendering was employed and countries where it was not; in fact, restrictive tendering was employed throughout the world - for example, it was permitted by European Community directives. At the same time, all agreed that restricted tendering was less desirable than public tendering and that it should be treated as an exception.

15. He was attracted by the Mexican proposal for amending article 15 bis as it highlighted an important point - namely, that restricted tendering should be permitted in cases where, for example, the cost of evaluating large numbers of tenders was greater than the cost of the goods to be procured.

16. With regard to paragraph (b) of article 15 bis as proposed by the Inter-American Development Bank, he said that in cases of urgency restrictive tendering would not take a significantly shorter time than public tendering, and procedures for meeting urgent needs were already provided for in the Model Law.

17. With regard to paragraph (c), he felt that where public tendering had failed restricted tendering was unlikely to be successful - unless the suppliers or contractors had meanwhile formed a cartel.

(Mr. James, United Kingdom)

18. With regard to paragraph (d), the problems that arose where the costs of tendering were disproportionately high would be overcome by the formulation proposed by the representative of Mexico, in which he would suggest that the word "significantly" be inserted before "disproportionate".

19. With regard to the second sentence in paragraph (1) of article 36 bis, if qualification was mandatory for all procurement methods one could delete the words "reputable firms well known in the field and".

20. He agreed with the comment made by the United States representative that it should be made clear that the aim of the deletion of the last phrase of article 36 bis was to remove the need for advance publicity and suggested that the phrase be replaced by "except the solicitation requirements set forth in articles 18 (1) and (2)". He also agreed with the comment made by the Japanese representative regarding the publication of some kind of notice in an official gazette or a similar journal.

21. In reply to a question from the Chairman, he said that in the light of the proposal made by the Mexican representative for amending article 15 bis he could withdraw his proposal - made at the previous meeting - for the addition of a paragraph (e).

22. Mr. TUVAYANOND (Thailand), noting that the proposals of the Mexican representative would entail the disappearance of paragraph (b) of article 15 bis, said he could not accept that; countries experiencing rapid economic growth were often faced with urgent needs that public tendering could not meet rapidly enough.

23. With regard to paragraph (d) of article 15 bis, he repeated the suggestion he had made at the previous meeting that the paragraph be amended to read "the procurement is of minor significance".

24. While he agreed that publicity might be desirable in order to ensure transparency, he felt it would suffice if a record was kept and made available to the public on request.

25. Mr. ANDERSEN (Denmark) expressed misgivings about the practical implications of adopting the two articles under consideration; he felt it would be better to keep article 18 as proposed by the Working Group.

26. If article 36 bis was going to be accepted, however, he would like to see the word "may" in paragraph (1) replaced by "shall".

27. Mr. MORAN BOVIO (Spain) said that, with the amendments suggested during the discussion, the Commission seemed to be well on the way to reaching a consensus on the two new articles.

28. Mr. WALLACE (United States of America), agreeing with the representative of Spain, said he felt there was a need for publicity over and above that achieved by keeping a record and making it available to the public on request.

(Mr. Wallace, United States of America)

29. He suggested that in paragraph (a) of article 15 bis the word "only" be added before "a limited number" and that "products or works" be amended to "goods or construction".

30. Mr. LEVY (Canada) said he could not support the consensus that seemed to be emerging. There were provisions elsewhere in the Model Law covering restricted tendering, and he did not see the need to elevate such tendering into a special method of procurement.

31. Mr. PHUA (Singapore) said that the reference to "reasons of economy and efficiency" in article 18 (3) should be included in article 15 bis and that the requirement - also in article 18 (3) - that the grounds and circumstances for employing restricted tendering should be recorded in the record of the procurement proceedings should be reflected in article 36 bis, the final phrase of which should be replaced by a reference to articles 18 (1) and 18 (2).

32. Mr. SAHAYDACHNY (Secretariat) said that, if an article on restricted tendering was included in chapter II, the recording requirement would be covered by article 11 (2).

33. Mr. TUVAYANOND (Thailand) said he found it difficult to understand why more thought was not being given to the danger of delaying governmental projects and why the deletion of paragraphs (b), (c) and (d) of article 15 bis was being so seriously contemplated.

34. The CHAIRMAN reminded the representative of Thailand that other procurement methods, such as single-source procurement, were envisaged for cases of urgency.

35. Mr. WALLACE (United States of America) said he agreed with the United Kingdom representative that in cases of urgency restricted tendering would not take a significantly shorter time than public tendering.

36. Mr. PEREZNIETO CASTRO (Mexico), responding to a point raised by the United States representative, said that paragraph (a) of article 15 bis was concerned with the complexity or specialized nature of the goods or construction, whereas paragraph (b) as proposed by him was concerned with situations where the time and cost of the tendering procedure were disproportionately high in relation to the value of the envisaged contract.

37. Mr. WALSER (Observer for the World Bank) said that, ideally, restrictive tendering should be permitted only under the circumstances envisaged in paragraph (a) of article 15 bis. However, if only a limited number of suppliers or contractors existed, the procuring entity should be obliged to send invitations to all of them.

38. If paragraph (b) as proposed by the representative of Mexico were adopted, the selection of suppliers or contractors to be invited to tender would be necessary, since to solicit a large number of tenders would result in disproportionately high evaluation costs.

39. Mr. PEREZNIETO CASTRO (Mexico) suggested that the words "selected by it" be deleted from the first sentence in paragraph 1 of article 36 bis as the underlying idea was conveyed by the words "selected in non-discriminatory manner" in the second sentence.

40. The CHAIRMAN asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 15 bis amended to read as follows:

> (Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of restricted tendering, when necessary for reasons of economy and efficiency, in accordance with article 36 bis, when:
>
> (a) by reason of the highly complex or specialized nature of the goods or construction required, only a limited number of suppliers or contractors of those goods or construction exist;
>
> (b) the time and cost of the examination and evaluation of a large number of tenders would be significantly disproportionate to the value of the goods or construction to be procured.

41. It was so decided.

42. The CHAIRMAN then asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 36 bis without the phrases "selected by it" and "reputable firms well known in the field and" in paragraph (1) and with the words "that publicity requirements shall not apply" in paragraph (2) replaced by "the solicitation requirements set forth in articles 18 (1) and (2)".

43. It was so decided.

44. The CHAIRMAN finally asked the Commission whether it wished to request the drafting group: to devise wording conveying the idea - put forward by the observer for the World Bank - that invitations to tender should be sent to all suppliers or contractors under the circumstances envisaged in paragraph (a) of article 15 bis; to consider whether, in paragraph (1) of article 36 bis, "may solicit" should be replaced by "shall solicit"; and to consider how provision might be made for the publication of some kind of notice in an official gazette or a similar journal.

45. It was so decided.

The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.

Articles 38-43

46. Mr. TUVAYANOND (Thailand), referring to article 38 (1), said loss or injury should not be the main justification for having recourse to the review mechanism; recourse should be permissible if the supplier or contractor had reasonable grounds to believe that the procuring entity was in breach of its duty under the Model Law. It was sometimes very difficult to prove loss or injury as a result of a breach of duty on the part of the procuring entity.

47. Mr. JAMES (United Kingdom) said that there must, of course, be an alleged breach of duty by the procuring entity for review to be sought, but under most common law systems and, he believed, in most civil law jurisdictions the supplier or contractor must, in order to be able to initiate review proceedings, claim loss or injury - or potential loss or injury. One should not depart from the principle that such a claim should be made in addition to a claim that there had been a breach of duty on the part of the procuring entity.

48. Mr. PHUA (Singapore), agreeing with the United Kingdom representative, said that article 38 (1) should be left as it stood. In that connection, he noted that the comments on article 38 in the draft Guide to Enactment (document A/CN.9/375) referred to the avoidance of "an excessive degree of disruption that might impact negatively on the economy and efficiency of public purchasing"; it was also pointed out that the degree of detriment that was required to be claimed was an issue to be resolved under the relevant legal rules in the enacting State.

49. Mr. PEREZNIETO CASTRO (Mexico) supported what had been said by the representative of the United Kingdom. The various issues had been discussed by the Working Group and a balanced text arrived at. A change would affect the structure of chapter V of the Model Law.

50. Mr. KOMAROV (Russian Federation) thought that it was logical that the possibility of seeking review should be limited to suppliers or contractors that had suffered or might suffer loss.

51. Mr. MORAN BOVIO (Spain) suggested that, as a matter of procedure and to save time, when a proposal to amend the Working Group's text met with opposition and no further support was expressed for it, it might be best to drop the matter and decide simply to leave the text as it stood.

52. Mr. WALLACE (United States of America) drew attention to the footnote to the heading of chapter V, which made it clear that the provisions for review were optional. There was perhaps no need for the text of that chapter to be debated in detail.

53. The CHAIRMAN suggested that the Commission consider articles 38-43 (chapter V) as a whole.

54. Mr. TUVAYANOND (Thailand) said that he could support adoption of the chapter as a whole, but would like to inquire whether it was intended that the square brackets around certain phrases should remain in the final text.

55. Mr. SAHAYDACHNY (Secretariat) said it was intended that the square brackets should remain; the idea was to offer options to enacting States.

56. Ms. CLIFT (Observer for Australia), supporting the adoption of articles 38-43, said that the commentary in the draft Guide to Enactment should say more about the reasons for choosing either option I or option II in the case of article 40 (3) (f).

57. The CHAIRMAN said that the point would be borne in mind when the Commission took up the draft Guide to Enactment.

58. Ms. CRISTEA (Observer for Romania), recalling that the Commission had agreed to delete article 18 (3), asked whether article 38 (2) (c) should be deleted as a consequence.

59. Mr. SAHAYDACHNY (Secretariat) said that, in his opinion, the subparagraph in question should be deleted; the matter would now be covered by subparagraph (a) of article 38 (2).

60. Mr. JAMES (United Kingdom) supported the amendment to article 38 (2) (d) proposed in document A/CN.9/377 by the Secretariat. The drafting group might consider whether there should also be a reference in article 38 (2) to article 21 (s).

61. The CHAIRMAN asked whether the Commission was ready to adopt articles 38-43 with the change proposed by the Secretariat to article 38 (2) (d), on the understanding that the references would be looked at by the drafting group.

62. It was so decided.

Article 32 (continued)

63. Mr. WALLACE (United States of America), recalling that, at its 506th meeting, the Commission had agreed that article 32 (6) should allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, suggested that article 32 (6) provide for the establishment of a cut-off figure below which publication in an official gazette or a similar journal would be sufficient, or no publication would be required, and above which there would be a notice requirement designed to ensure that the appropriate audience was reached.

64. Mr. TUVAYANOND (Thailand) thought it would be sufficient to provide that the public should have access to information on all the decisions taken.

65. Mr. LEVY (Canada) said that he could accept the idea behind the suggestion made by the representative of the United States and proposed that the amendment to article 32 (6) take the form of a new sentence along the following lines: "Procuring entities shall, in accordance with the regulations, publicize the award of procurement contracts".

66. Mr. JAMES (United Kingdom) thought that the solution was perhaps too simple; the extent of the publicity required should depend on the value of the contract.

The meeting rose at 12.30 p.m.

UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.509
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 509th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 14 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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Consideration of draft Model Law on Procurement (continued)

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V.93 87988 5834E

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Distr.: 6 August 1993

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Article 11 bis

1. The CHAIRMAN invited the United States delegation to introduce its proposal.

2. Mr. WALLACE (United States of America), recalling the brief discussion on article 32 at the end of the previous meeting, submitted the following proposal for an article 11 bis: "Public notice of procurement contract awards. The procuring entity shall in all procurement proceedings publish notice of any procurement contract, promptly after its entry into force, in a manner to be provided for in the procurement regulations."

3. Ms. ZHANG Yuejiao (China) said that she could go along with the proposal made by the United States representative, although she preferred the proposal made by the representative of Canada at the end of the previous meeting.

4. Mr. JAMES (United Kingdom) said that the Model Law should not place an obligation on the procuring entity to publish notice of procurement contracts of low value. Notice of most contracts should be published, but contracts of a value below a certain monetary amount, which would have to be fixed in relation to the economy of the enacting State, should not have to be publicized.

5. Mr. LEVY (Canada), expressing support for the comments of the United Kingdom representative, said that the proposal made by the Canadian delegation at the end of the previous meeting contained the same pitfall as the proposal of the United States representative - namely, it was mandatory in all cases; his delegation had not intended that. The regulations should provide guidance as to the manner and extent of the publicizing of procurement contract awards, and there should be a cut-off point below which publicizing was not mandatory.

6. He proposed the following wording: "The procurement regulations shall specify in what instances and in what manner notice of a procurement contract shall be published by the procuring entity".

7. Mr. WALLACE (United States of America) suggested the following revised wording: "The procuring entity shall promptly publish notice of procurement contract awards, in the manner and to the extent provided for in the procurement regulations".

8. Mr. SAHAYDACHNY (Secretariat) advised caution as regards referring to procurement regulations; the Model Law was not based on the assumption that such regulations would be issued.

9. Mr. PHUA (Singapore) suggested that the revised wording suggested by the United States representative be paragraph (1) of article 11 bis, followed by a paragraph (2) reading as follows: "Paragraph (1) shall not apply to procurement contracts below the value of ...". The appropriate figure could be inserted by the enacting State.

10. Mr. PRIESTLEY (Observer for Australia) urged the Commission to make the provision mandatory and proposed the following wording: "The procuring entity shall promptly publish notice of all procurement contract awards".

11. If it was felt that such a provision would give rise to undue expense in the case of small procurement contracts, perhaps official gazettes could be used as the normal place of publication of notices.

12. Ms. PIAGGI-VANOSSI (Argentina), supporting the proposal of the United States representative, agreed with the observer for Australia regarding the use of official gazettes.

13. Mr. GRIFFITH (Observer for Australia) said that his delegation could go along with the suggestion of the Singapore representative, except that, in its view, the provision in paragraph (2) should be optional - "Paragraph (2) need not apply ...".

14. With regard to paragraph (1), he suggested the following wording: "The procuring entity shall promptly publish notice of procurement contract awards. Regulations may make provision for advertising".

15. Mr. SAHAYDACHNY (Secretariat) said there appeared to be a wish that paragraph (1) of article 11 bis should state the rule that awards of procurement contracts would be publicized in the official gazettes of enacting States and that the rule should be subject to paragraph (2), which would state that procurement regulations might set a monetary value below which the publication requirement would not apply.

16. Regarding the idea that the provision in paragraph (2) should be optional, he pointed out that the entire Model Law was, in a sense, optional.

17. Mr. GRIFFITH (Observer for Australia) said his delegation understood the wording favoured at present to be on the following lines:

> "(1) The procuring entity shall promptly publish notice of procurement contract awards. Regulations may be made providing for publication.
>
> (2) Paragraph (1) shall not apply to procurement contract awards below the value of ..."

18. The Guide to Enactment could mention the possibility of using official gazettes in cases where countries had them.

19. Mr. JAMES (United Kingdom) suggested that paragraph (2) be modified to read as follows: "Paragraph (1) shall not apply to procurement contract awards below the value specified in the procurement regulations". The provision would thus be optional, since it would depend on whether a State issued procurement regulations.

20. Mr. LEVY (Canada) said that, in the light of what had just been said by the representatives of Australia and the United Kingdom, he would propose wording on the following lines:

"(1) Procuring entities shall promptly publish notice of procurement contract awards.

(2) Regulations may be issued providing for the manner in which and the extent to which such notice shall be published.

(3) Paragraph (1) shall not apply to procurement contracts below a certain value specified in the procurement regulations."

21. The CHAIRMAN asked whether the Commission could accept the wording of article 11 bis proposed by the representative of Canada.

22. It was so decided.

23. The CHAIRMAN said that the Commission had completed its consideration of the draft Model Law, and he invited the Commission to proceed with consideration of the draft Guide to Enactment.

Consideration of draft Guide to Enactment (A/CN.9/375)

24. Mr. WALLACE (United States of America), referring to the note by the Secretariat on the procurement of services (document A/CN.9/378/Add.1), asked whether the Commission would be able to deal with that aspect of its possible future work during its current session. He also asked whether the Commission would be discussing the possibility of the Secretariat's preparing a short paper on electronic data interchange (EDI) in procurement.

25. The CHAIRMAN said he hoped there would be an opportunity for the Commission to consider both matters before the end of the session, in the context of its future work.

26. Ms. ZIMMERMAN (Canada) asked whether the Commission would consider the report of the drafting group before or after the draft Guide to Enactment.

27. The CHAIRMAN said that the drafting group would complete its report soon, but he felt that the Commission should meanwhile consider the draft Guide to Enactment.

28. Mr. MORAN BOVIO (Spain) suggested that comments on purely linguistic matters be submitted directly to the Secretariat.

29. The CHAIRMAN agreed.

30. Mr. WALLACE (United States of America) recalled that, on many occasions in the course of its consideration of the Model Law, the Commission had agreed that certain points should be reflected in the Guide to Enactment. That raised the question of how to proceed with the draft Guide, which the Commission wished to approve during its current session.

31. Mr. LEVY (Canada) suggested that the Commission deal first with the report of the drafting group, turning to the draft Guide whenever it had completed a section of the report.

32. The CHAIRMAN said he would prefer it if the Commission began with the draft Guide.

33. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Canada, said that one section of the drafting group's report was already available (document A/CN.9/XXVI/CRP.4) and could be studied by delegations before the next meeting. It would then be possible to decide how much time should be devoted to consideration of the draft Guide.

34. The CHAIRMAN urged the Commission to take up the draft Guide, beginning with the Introduction.

Introduction to the draft Guide and commentary on the Preamble

35. Mr. KOMAROV (Russian Federation), commenting on paragraph 11 (Procurement methods in the Model Law), recalled that the Commission had adopted an article 15 bis, making restricted tendering a method of procurement. That should be reflected in the second part of paragraph 11 of the Introduction, or somewhere else in the draft Guide.

36. Mr. SAHAYDACHNY (Secretariat) said that the Secretariat would reflect in the draft Guide all changes made by the Commission to the Model Law.

37. Mr. FRIES (United States of America), referring to paragraphs 12-16 of the Introduction (Administration of procurement), said that greater emphasis should be placed on the key role of public administrative bodies in implementing procurement legislation and on the need to equip them to do so.

38. Mr. GRIFFITH (Observer for Australia) agreed with the United States representative.

39. Paragraphs 17 and 18 of the Introduction (Procurement of services) should be brought up to date in the light of the Commission's decision to deal with the procurement of services on another occasion.

40. Also, greater emphasis should be placed in the Guide to Enactment on the basic philosophy underlying the Model Law, especially as regards the need for transparency and honesty on the part of public administrations. Perhaps the Commission could give the Bureau instructions to that effect.

41. Mr. WALLACE (United States of America), suggesting deletion of the last sentence of paragraph 18, said that a question yet to be settled by the Commission was the extent to which procuring entities should take price into account when awarding contracts for services.

42. Reverting to matters of procedure, he said he was reluctant to entrust to the Secretariat the task of reflecting in the Guide to Enactment the conclusions reached by the Commission in all their nuances.

43. The CHAIRMAN said it was for the Commission to instruct the Secretariat as to what the draft Guide should contain.

44. Mr. GRIFFITH (Observer for Australia) said he was confident that the Bureau was capable of reflecting the conclusions of the Commission in the Guide to Enactment. However, time was now too short for the Commission to go through the entire text of the draft Guide.

45. Perhaps the Commission could go through the draft Guide as far as possible and then entrust to the Bureau the task of preparing a new draft - to be circulated for comments which should be submitted within, say, 90 days.

46. At all events, the Commission should avoid having to return to the item at its next session.

47. Mr. LEVY (Canada), endorsing that approach, said that the United States representative was perhaps being unduly pessimistic about the Secretariat's ability to reflect in the Guide the conclusions reached by the Commission.

48. Mr. WALLACE (United States of America) said that the Guide to Enactment was an extremely important document and that the Commission should give it the attention which it deserved.

49. A practical - but by no means ideal - approach might be one along the lines suggested by the observer for Australia: the Commission could adopt the draft Guide provisionally; the Secretariat would revise it in the light of relevant reports of the Working Group and the comments made during the present session; the revised draft would be circulated to members of the Commission for early comment; and the Secretariat would produce the final text in the light of the comments received by it.

50. Ms. DODSWORTH (United Kingdom) said that no one underestimated the importance of the Guide to Enactment. In the time still available during the present session, however, the Commission could do no more than highlight key points, leaving the detailed drafting to the Secretariat. Any points missed could be taken up by Commission members when commenting on the revised draft.

51. Ms. ZIMMERMAN (Canada) asked whether the Commission had ever adopted a document provisionally, before it was actually completed.

52. Mr. HERRMANN (Secretary of the Commission) said that the only instance he could immediately recall concerned the Legal Guide on International Countertrade Transactions. There, however, the open questions had been merely terminological ones.

The meeting was suspended at 3.32 p.m. and resumed at 4.05 p.m.

53. The CHAIRMAN asked the representative of the United States of America to present a compromise approach agreed upon during the suspension of the meeting.

54. Mr. WALLACE (United States of America) said it had been agreed that: the Commission would discuss the draft Guide as fully as possible in the time still available; the Secretariat would then, within a reasonable time, prepare

(Mr. Wallace, United States of America)

a revised draft in the light of the Commission's deliberations and the changes made to the Model Law and in the light of various reports of the Commission and the Working Group; a revised draft would be sent to Commission members for comments which should be submitted within 30-40 days, and preparation of the final draft would be entrusted to the Secretariat.

55. The CHAIRMAN said that, as far as he could see, the only problem with that approach was that Commission members might submit conflicting comments.

56. Mr. PEREZNIETO CASTRO (Mexico) did not think that would be a problem; the Secretariat had enough experience to deal with conflicting comments.

57. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Mexico, said a problem might arise if the Secretariat received a comment calling for a major reformulation or for the incorporation of something not discussed in the Working Group or the Commission. But again, the Secretariat had enough experience to judge whether such a comment should be reflected in the Guide to Enactment.

58. Mr. MORAN BOVIO (Spain), warning against overburdening the Secretariat, said that the draft Guide to Enactment merely needed to be updated in the light of the discussions which had taken place and the decisions which had been reached during the Commission's present session.

59. The CHAIRMAN said that the Commission appeared to agree that the draft Guide to Enactment should be adopted provisionally pending the incorporation by the Secretariat of comments received from Member States within a specified period of time.

60. Mr. TUVAYANOND (Thailand) suggested that the Guide to Enactment be designated as a "commentary"; all the Secretariat would then have to do would be to update it.

61. Mr. MORAN BOVIO (Spain) expressed misgivings about the suggestion made by the representative of Thailand.

62. Mr. WALLACE (United States of America) said it was not clear to him whether the commentary which the representative of Thailand had in mind was the same thing as the commentary referred to in paragraph 5 of the Introduction to the report of the Working Group on its fifteenth session (document A/CN.9/371).

63. Mr. HERRMANN (Secretary of the Commission) said that with so many references having been made to provisional adoption of the Model Law and the Guide to Enactment, the Commission might usefully consider when final adoption should take place.

64. On the question of the Secretariat's future tasks, he said that the Working Group had earlier operated on an informal basis, without reports, and that the Secretariat might indeed have problems with conflicting comments on the draft Guide.

65. Mr. FRIES (United States of America) agreed that the Commission should give thought to the question of final adoption.

66. He imagined that most of the comments received on the revised draft would relate to drafting, only a few being of a substantive nature. Either way, they should reflect the discussions taking place during the present session and not raise controversial new issues.

67. Mr. TUVAYANOND (Thailand) said he was sure that the Secretariat had noted all comments and conclusions of relevance to the Guide to Enactment and that there would be no need for the Commission to wait until its next session before adopting it.

68. Mr. KOMAROV (Russian Federation), supporting what had been said by the representative of Thailand, said he would not like final adoption of the Model Law to be delayed by protracted work on the draft Guide. The Commission might use the same kind of working method as it had used in the preparation and adoption of the Legal Guide on International Countertrade Transactions.

69. The CHAIRMAN said that, if the Commission wished to approve the draft Guide subject to its reflecting the conclusions reached by the Commission at the present session, the Commission should go through the Guide in order to see whether anything had been overlooked.

70. It was so agreed.

71. The Introduction to the draft Guide and the commentary on the Preamble were approved.

Commentaries on articles 1-8

72. The commentaries on articles 1-8 were approved.

Commentary on article 9

73. Mr. PHUA (Singapore) said that the last sentence of paragraph 1 presupposed that domestic legislation already authorized the use of EDI in procurement. The text should make it clear that the use of EDI in procurement was subject to domestic legislation.

74. Mr. WALLACE (United States of America), referring to the comment made by the representative of Singapore, said that the text might state that article 9 had not been drafted as a general enabling provision for the use of EDI in procurement and that the Model Law at present contained no such general enabling provision.

75. Reverting again to matters of procedure, he asked whether it was the intention of the Secretariat to send a revised draft Guide to Commission members for comment.

76. The CHAIRMAN said his impression was that the Commission had moved away from that idea and that it wanted everything to be decided at the present session subject to updating by the Secretariat. However, that would not prevent any delegation from making suggestions later for reflection in the report.

77. Mr. WALLACE (United States of America) said he was not sure that should be the consensus in the Commission. While believing that the Model Law should be adopted in its final form before the end of the present session, he also believed that only a properly revised Guide to Enactment would enhance the impact of the Commission's work. There must be sufficient time for deliberation, comment and reflection.

78. Mr. KOMAROV (Russian Federation) said that the greatest problem undoubtedly related to new text concerning articles amended or introduced during the present session, and he wondered whether Commission members would have an opportunity to look at that new text before they left Vienna.

79. Mr. HERRMANN (Secretary of the Commission) replied that the Secretariat could produce new text very quickly if requested to do so, but it would prefer not to as it wanted to do a proper job.

The meeting rose at 5 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.510
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 510th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 15 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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New international economic order: procurement (continued)

Consideration of draft Guide to Enactment (continued)

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V.93 88011 5838E

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Distr.: 6 August 1993

The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Guide to Enactment (A/CN.9/375) (continued)

1. The CHAIRMAN said he hoped the Commission could conclude its consideration of the draft Guide to Enactment that morning, so that it could begin work that afternoon on the report of the drafting group. He asked if there were any further comments on the section of the Guide relating to article 9.

2. Mr. WALLACE (United States of America) said that he would appreciate the opportunity to revert to the commentary on the Preamble and to commentaries on some early articles.

3. In order to dispel any possible misunderstanding, he wished to stress that nothing he had said the previous day should be taken to mean that his delegation was opposed to adoption of the draft Guide at the current session. He had merely wished to point out that, because of shortage of time, it might be difficult to reach agreement on a final version that would be satisfactory to all. It would have to be left to the Secretariat to revise the Guide in the light of the discussion that had taken place during the session.

4. The CHAIRMAN said there would be no difficulty in proceeding in the way suggested by the United States representative.

Commentary on the Preamble

5. Mr. WALLACE (United States of America) said that the first sentence of the commentary on the Preamble raised difficulties, since, depending on the legal system of the country concerned, the reason for including a statement of objectives might or might not be to provide guidance on the interpretation and application of the Model Law. The question of whether the Preamble had any force in law was a difficult one, and he was not sure whether the Guide should make such a broad statement.

6. Mr. TUVAYANOND (Thailand) said that, for his country at least, the Preamble was important, and he would like it to be retained as it stood.

7. Mr. JAMES (United Kingdom) said that, although a number of countries did not adopt preambles as part of their enacted laws which would have an effect in relation to the interpretation of those laws, that point was covered by the recommendation made in the last sentence of the commentary on the Preamble.

8. He reminded the Commission that the wording contained in the Preamble had once been incorporated in the Model Law itself, as article 3. It had then been decided that it would be more appropriate as a preamble because it did not of itself create substantive rights or obligations. However, it had certainly been regarded as a provision which was meant to influence interpretation of the Model Law. He himself considered the principles enunciated in the Preamble extremely important.

9. Mr. PHUA (Singapore) agreed that the last sentence of the commentary on the Preamble should be sufficient to address the United States representative's concern. If that was not enough, the phrase "or to use preambles in interpreting and applying laws" could perhaps be inserted after "to include preambles" in that sentence.

10. Mr. MORAN BOVIO (Spain) said that, at least in those countries where the system of civil law - rather than common law - applied, the Preamble as now worded would be useful, because the statement of objectives would indeed provide guidance on the interpretation and application of the law, and would be taken into account by legislators and judges. Any difficulties that common law countries might encounter could be overcome by the amendment proposed by the representative of Singapore.

11. Mr. SOLIMAN (Egypt) said he favoured retention of the Preamble as it stood.

12. Mr. LEVY (Canada) supported the proposal made by the representative of Singapore.

13. The commentary on the Preamble, as amended, was adopted.

Commentary on article 1

14. Mr. TUVAYANOND (Thailand) said that in paragraph 1 of the commentary on article 1 the phrase "coverage of all types of procurement" might be understood to mean that the procurement of services was covered. He would prefer the phrase "coverage of procurement of all types of goods and construction".

15. Mr. WALLACE (United States of America) said that he could go along with such a drafting change.

16. With regard to the first two sentences of paragraph 2 of the commentary, he felt that they should be expanded in order to convey the Commission's views about what kinds of regulations should be issued and how they should be issued.

17. Mr. MORAN BOVIO (Spain), pointing out that paragraph 9 of the Introduction stated that the Model Law was a "framework" law intended to be complemented by regulations, suggested that a reference to that paragraph be included in paragraph 2 of the commentary on article 1.

18. Mr. SAHAYDACHNY (Secretariat) said there would be no difficulty in making it clear, perhaps in paragraph 9 of the Introduction, that the procurement regulations referred to in the Model Law should be open and transparent; that point could also be brought out in the commentary on article 1, by means of a cross-reference. In addition, the types of procurement covered could also be specified more clearly.

19. Mr. PHUA (Singapore) suggested the insertion, after the second sentence in paragraph 2, of a reference to article 5 ("Public accessibility of legal texts").

20. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 1, which would be finalized by the Secretariat in the light of the Commission's discussion.

21. It was so decided.

Commentary on article 2

22. Mr. FRIES (United States of America) considered that paragraph 2 should offer guidance on the weight to be attached to the various factors listed there.

23. Mr. WALLACE (United States of America) added that it was not clear what kinds of entities were meant in the case of subparagraph 2 (f) and that subparagraph 2 (g) touched on matters which might be controversial.

24. Mr. LEVY (Canada) said there were limits to the amount of guidance the Commission should offer to sovereign States and doubted whether it could usefully attempt to provide more guidance than that already contained in the Guide, especially where social policy decisions were involved.

25. Mr. MORAN BOVIO (Spain) said that, while he believed that the Commission should not attempt to tell legislators in sovereign States how to deal with internal matters, he also believed that more guidance would assist sovereign States in exercising their sovereignty more effectively.

26. Mr. KINGA (Cameroon) said that the guidance given in paragraph 2 was sufficient. Legislators in developing countries such as his were quite capable of deciding what should be taken into account in applying the Model Law.

27. Mr. PEREZNIETO CASTRO (Mexico), agreeing with the representative of Cameroon, said that the Commission should not attempt to provide guidance on matters properly belonging to the internal affairs of sovereign States. However, national legislators should ideally have all the necessary information, so a balance needed to be struck between providing as much information as possible and not appearing to interfere in the internal affairs of enacting States.

28. Mr. KOMAROV (Russian Federation) said that, while he considered the point raised by the United States delegation to be a valid one, he would not like to see the Commission opening a Pandora's box - for example, by broaching issues related to the social and economic structures of enacting States.

29. Paragraph 2 as it stood at present was, in his opinion, sufficient for drawing the attention of States to factors which should be taken into account. In order to make it even clearer that the list of factors in that paragraph was not an exhaustive one, one might perhaps add in the chapeau the expression "in particular" between "consider" and "factors".

30. Ms. CRISTEA (Observer for Romania) said that the situation envisaged in subparagraph 2 (g) was covered by subparagraph 2 (b), since any entity integrated within a centralized economic plan would be entirely managed or

(Ms. Cristea, observer for Romania)

controlled by the Government; in her opinion, subparagraph 2 (g) could therefore be deleted. Also, she felt that the second part of subparagraph 2 (f) should be deleted as it lacked clarity.

31. Mr. TUVAYANOND (Thailand) supported the views expressed by the observer for Romania.

32. The CHAIRMAN said that, leaving aside the question of the deletions envisaged by the observer for Romania in paragraph 2, the commentary on article 2 appeared to be acceptable to the Commission as it stood. The second comma in the penultimate sentence of paragraph 1 - a typographical error - would be deleted.

33. It was so decided.

Commentary on article 3

34. Mr. WALLACE (United States of America) said that in the last sentence of paragraph 1 it should be made clear that, where international agreements did not apply, procurement would be governed not only by the Model Law but also by other bodies of law - such as contract law. He suggested the addition of a reference to paragraph 10 of the Introduction to the Guide to Enactment.

35. He also suggested that the inconsistency between "EC" and "EEC" in the first sentence of paragraph 1 be eliminated.

36. The CHAIRMAN said that those points would be dealt with by the Secretariat. On that understanding, he took it that the Commission wished to adopt the commentary on article 3.

37. It was so decided.

Commentary on article 4

38. Mr. WALLACE (United States of America) thought that, in the first line of paragraph 1, the reference to "paragraph 7" should be to "paragraphs 7 and 9" and that the last sentence of paragraph 1 should either be spelled out more clearly or deleted.

39. With regard to paragraph 2, in the example "limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to what is required to deal with the urgent circumstances)" the words in parentheses should be placed after "quantity" in order to make it clear that procuring entities should not exploit emergencies and procure more than what was needed in order to deal with them.

40. That point was a very important one, and the Guide should highlight it and other important points that did not stand out clearly in the Model Law itself.

41. Mr. TUVAYANOND (Thailand), agreeing to the moving of the words in parentheses in paragraph 2, said that, if there was fear of abuse, a high-level governmental decision could be required in such cases.

42. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 4 subject to the comments made.

43. It was so decided.

Commentaries on articles 5-10

44. Mr. WALLACE (United States of America), referring to the last sentence of paragraph 1 of the commentary on article 8, said that some regional economic groupings did more than just grant procurement preferences to members of the grouping - boycott arrangements being a case in point. With regard to paragraph 2, concerning the problematic "margin of preference" question, he wondered whether that paragraph, which appeared to give advice to Governments rather than merely clarifying issues, should not be deleted. There was no mention of "margin of preference" in article 8.

45. Mr. HUNJA (Chairman of the Working Group) said that a problem the Secretariat had encountered in discussions with delegations from potential enacting States, especially developing countries, concerned the compatibility of international procurement proceedings with the need to develop local industry, and the Secretariat had felt it important, in connection with article 8, to stress that it was not necessary to exclude foreign suppliers and contractors in order to help local suppliers and contractors; the latter could be given a certain advantage through "a margin of preference".

46. Mr. TUVAYANOND (Thailand) said that it should be possible to grant preference to national suppliers and contractors and that it was for the particular Government to decide whether it wished to authorize the granting of preference.

47. Ms. ZHANG Yuejiao (China) said that the granting of a margin of preference to local suppliers and contractors was a common practice and should be allowed for.

48. Mr. JAMES (United Kingdom) said he thought it was useful to refer in the commentary on article 8 to the existence of possibilities for protecting local suppliers and contractors in various ways. However, perhaps the text should be redrafted so as to make it clear that it was not the purpose of the references to articles 17 and 29 to de-emphasize the importance of the "without regard to nationality" principle underlying article 8.

49. Mr. WALSER (Observer for the World Bank), supporting the retention of paragraph 2, said that the paragraph explained why foreign competition should not be completely excluded. It could perhaps be improved by drawing attention to the disadvantages of granting a margin of preference for local suppliers and contractors: firstly, the cost increase if the overall lowest-price tender was not selected and, secondly, reciprocal action on the part of other countries.

50. Mr. PRIESTLEY (Observer for Australia) and Mr. SOLIMAN (Egypt) also supported the retention of paragraph 2.

51. Mr. WALLACE (United States of America) said that, if paragraph 2 was to be retained, it should be redrafted along the lines indicated by the representative of the United Kingdom.

52. The CHAIRMAN said that the comments made by the observer for the World Bank should also be taken into account in the redrafting of the paragraph.

53. Drawing attention to the commentary on article 9, he informed the Commission that the drafting group was finalizing the wording of articles 9 and 25 in the light of the conclusions reached during the Commission's 501st meeting.

54. Mr. UEMURA (Japan) recalled that in its comments on article 9, in document A/CN.9/376/Add.2, his Government had raised the question whether a procuring entity could prohibit the submission of tenders by mail. He hoped the Guide would give a clear indication in that regard.

55. Mr. WALLACE (United States of America) agreed with the representative of Japan; it was important that the matter be dealt with in the Guide.

56. He did not think the intention was that it should be permissible to use electronic data interchange (EDI) for transmitting all the documents involved in procurement under the Model Law, but article 9 as it stood might be taken as implying that EDI could be so used. He felt that the Guide should contain a caveat regarding the limitations of EDI use and that the possibilities of EDI should be considered at a later session.

57. Mr. HERRMANN (Secretary of the Commission) said that article 9 as it stood did not exclude any form of communication except a purely oral message, and it did not preclude the transmission of any type of document by EDI, although there had been talk of not permitting the use of EDI for the transmission of certain documents, such as tender securities. However, the area in question had not been studied in detail by those who had produced the draft Model Law.

58. Mr. WALLACE (United States of America) said that, in the light of what the Secretary of the Commission had just said, the Guide to Enactment should perhaps warn potential enacting States against inadvertently authorizing the unlimited use of EDI.

59. Ms. WEINMEIR (Austria) felt that States could be trusted to resolve the problems associated with the use of EDI in procurement.

60. Mr. LEVY (Canada), supporting the remark made by the Austrian representative, said that EDI was going to be used very extensively in procurement and that in the real world the law had to follow technology, not the other way round.

61. Mr. PHUA (Singapore) said that the Model Law should not be formulated in such a way as to restrict the use of EDI, but he feared that, if the commentary on article 9 was left unchanged, technocrats eager to jump on the EDI bandwagon might interpret the article as an enabling provision. Perhaps the Guide could contain - rather than the caveat envisaged by the United States representative - a statement to the effect that the Model Law should be applied in conjunction with domestic laws enabling the use of EDI; that would focus legislators' minds on the issues raised by the use of EDI.

62. Mr. HERRMANN (Secretary of the Commission), expressing doubts about the suggestion made by the representative of Singapore, said he understood article 9 of the Model Law to mean that all forms of communication except oral messages were acceptable - in other words, all forms including EDI. That being so, he felt it would be illogical to say in the Guide to Enactment that special enabling legislation would be necessary in the case of EDI.

63. Mr. PHUA (Singapore) said that the issue was whether the domestic legislation of potential enacting States permitted the use of EDI. If the use of EDI was already permitted, well and good: the Model Law could be integrated into the domestic legislation with no problem. However, where - for example - it was stated in the domestic legislation that tender securities should be submitted in writing, there would be a conflict with the Model Law, which gave the impression that tender securities could be submitted in electronic form.

64. Mr. FRIES (United States of America) said that it was not necessary to speak of "enabling legislation" in the Guide. A simple reference could be made to "relevant domestic legislation concerning EDI", calling the attention of legislators to the connection between the Model Law and the implementation of EDI technology in their country.

65. Ms. ZIMMERMAN (Canada) said her delegation had been assuming that article 9 provided for the use of EDI provided confidentiality and other requirements were met. Her delegation was now confused as to the Commission's intentions.

66. Mr. WALSER (Observer for the World Bank) said he was unhappy with the language of article 9, which spoke of "a form [of communication] that provides a record of the content of the communication". The Guide should explain what was meant by providing a record of the content of the communication, giving examples of cases where a record was and was not provided.

67. Mr. HERRMANN (Secretary of the Commission), referring to the comments made by the representative of Singapore, said that there need not be a conflict with the Model Law in cases where the domestic legislation required - say - tender securities to be submitted in written form.

68. The Model Law did not envisage the transmission of every conceivable kind of communication by means of EDI. For example, bills of exchange - listed among the forms of "tender security" in article 2 - were subject to very strict requirements in most countries, and their transmission by means of EDI was unlikely to be accepted; much the same would apply in the case of - say - documents providing evidence of nationality.

(Mr. Herrmann, Secretary of the Commission)

69. In his opinion, the reference to EDI in the Guide should - on the lines envisaged by the United States representative - take the form of a warning that enactment of the Model Law would open the way to the use of EDI without any enabling legislation and that enacting States might wish to bear in mind various operational considerations.

70. Mr. PHUA (Singapore) said that he would be satisfied if the Secretary's comment could be reflected in the Guide.

71. The CHAIRMAN, indicating that it would, said he took it that the discussion of the commentary on article 9 was concluded.

72. Since there were no comments on article 10, he considered that the discussion of the commentaries on articles 1-10 was concluded.

The meeting rose at 12.30 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.511
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 511th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 15 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group

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V.93 88017 5827E

Distr.: 6 August 1993

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The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (A/CN.9/XXVI/CRP.4)

1. Mr. SAHAYDACHNY (Secretariat) explained that the report of the drafting group was in the form of a corrigendum, showing the insertions and deletions made by the drafting group in the Working Group's text (A/CN.9/371, annex) in implementing the Commission's decisions. The first part of the report covered the preliminary matter and articles 1 to 10 of the Model Law. The remaining articles would be covered in addenda. In the final text of the Model Law, to be prepared by the drafting group, the articles would be renumbered as appropriate, and all cross-references checked.

2. The CHAIRMAN invited the Commission to consider the amendments to the draft Model Law article by article, beginning with the title.

Title

3. Mr. MORAN BOVIO (Spain) noted that the title in the Spanish version of the report spoke of "la contratación publica" instead of "la adjudicación de contratos públicos", the correct formula.

4. The text for the title proposed by the drafting group was adopted.

Preamble

5. The change proposed by the drafting group was adopted.

Article 1, paragraph (2) (a)

6. The proposed change was adopted.

Article 2 (b) (ii)

7. The proposed change was adopted.

Article 2 (c)

8. The proposed change was adopted.

Article 2 (g)

9. Mr. LEVY (Canada) said his delegation preferred the second of the two versions submitted by the drafting group (the "alternative version").

10. Mr. PEREZNIETO CASTRO (Mexico) said that, since stand-by letters of credit were unknown in many developing countries, it would be better to refer to "letters of credit" rather than "stand-by letters of credit".

11. Mr. BURMAN (United States of America) thought that both terms should be included. As a form of security, stand-by letters of credit were quite different from ordinary letters of credit.

12. Ms. ZIMMERMAN (Canada) said that, at its fourteenth session, the Working Group had agreed "to delete the reference to letters of credit from the illustrative list of instruments that could serve as tender securities so as not to give undue prominence to what would be an unusual use of ordinary commercial letters of credit in a guaranty function" (A/CN.9/359, para. 31).

13. Mr. AL-NASSER (Saudi Arabia) said that the verb "to secure" was not adequately rendered in the Arabic version of the definition.

14. The CHAIRMAN said the necessary correction would be made. He asked whether the word "stand-by" should be deleted.

15. Mr. MORAN BOVIO (Spain) thought that both the stand-by letter of credit and the ordinary letter of credit could be mentioned.

16. In reply to a question from Mr. WALSER (Observer for the World Bank), Mr. HERRMANN (Secretary of the Commission) said that the stand-by letter of credit was a special form of letter of credit which was a functional equivalent of an independent bank guarantee.

17. Mr. PHUA (Singapore) noted that tender securities were dealt with in the whole of article 27, and asked why only article 27 (1) (f) was referred to in the proposed text.

18. Mr. JAMES (United Kingdom) explained that the purpose of the reference was to define the obligations that could be guaranteed by means of a tender security. The obligations in question were set out in article 27 (1) (f).

19. The alternative version of article 2 (g) preferred by the drafting group was adopted.

Article 3 (b)

20. The proposed text was adopted.

Article 6, paragraphs (6) and (7)

21. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had found it hard to implement the decision of the Commission with regard to article 6. The Commission had decided that paragraph (6) of article 6 should be amended to include materially incomplete information concerning the qualifications of a supplier or contractor. The Commission had also decided that the supplier or contractor should be allowed, up to the deadline for the submission of tenders, to correct material inaccuracies or incompleteness in the information. That decision had caused difficulty. According to paragraph (7), the right of rectification was excluded where prequalification proceedings had taken place. On the other hand, where there had been no prequalification proceedings, the fact that tenderers had submitted inaccurate or incomplete information would usually only be discovered at the time when

(Mr. Sahaydachny, Secretariat)

the bids were opened; yet at that time the right to rectify such information would expire. It was therefore suggested that paragraph (7) be revised to make the deadline for providing complete proof of qualification either "within a reasonable time after the deadline for the submission of tenders or best and final offers" or "in the course of the procurement proceedings".

22. Mr. WALLACE (United States of America) pointed out that, according to the text proposed for paragraph (6) (b), a procuring entity could disqualify a supplier or contractor if it found at any time that the information submitted was materially inaccurate or incomplete. That provision would have to be made subject to paragraph (7).

23. Mr. HERRMANN (Secretary of the Commission) said that the drafting group had preferred to define the scope of application of paragraph (7) in relation to paragraph (6).

24. Mr. WALSER (Observer for the World Bank) agreed with the view that the original text of paragraph (7) raised problems, but had grave misgivings about the new text proposed, which would allow bidders to submit additional information or make corrections after the opening of tenders. There was a risk that a bidder would provide inadequate information so that, if his bid turned out to be too high after the opening of tenders, he could subsequently refuse to provide the further information required in order to be rejected without loss of tender security. In any case, it would be dangerous to allow the bidder merely "to undertake" to provide the necessary information; he should provide it immediately. He would prefer the paragraph to be dropped altogether.

25. Mr. JAMES (United Kingdom) said that the reference to paragraph (6) (a) in the proposed text for paragraph (7) was intended to make it clear that the right to complete the information or correct inaccuracies did not apply where the information was false. To avoid any ambiguity, paragraph (6) (b) should be made subject to paragraph (7).

26. Mr. PRIESTLEY (Observer for Australia) wondered whether paragraph (7) would apply to a supplier or contractor who had already prequalified but whose tender contained inaccurate or incomplete information. The first phrase of paragraph (7), "except where prequalification proceedings have taken place" was perhaps unnecessary.

27. Ms. ZIMMERMAN (Canada) felt that the word "may" in paragraph (6) (a) should be changed to "shall" in order to make the obligation to disqualify a supplier or contractor for false information mandatory rather than discretionary.

28. Mr. TUVAYANOND (Thailand) expressed agreement with what had been said by the representative of the World Bank. To allow suppliers or contractors to rectify incomplete or inaccurate information after the deadline for the submission of tenders would open the door to abuse.

29. Mr. PEREZNIETO CASTRO (Mexico) also considered the remarks of the representative of the World Bank to be highly relevant. The problem was to define the deadline for the rectification of inaccurate or incomplete

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(Mr. Pereznieto Castro, Mexico)

information. As far as deleting the reference to prequalification proceedings was concerned, he thought that prequalified bidders would already have demonstrated their qualifications.

30. Mr. WALLACE (United States of America) said that it would perhaps be sufficient for paragraph (7) to deal solely with the case of the rectification of materially inaccurate or incomplete information. Regarding the question raised by the observer for Australia, he pointed out that, under paragraph (8) of article 7, a prequalified bidder could be required to update his qualification. The reference to prequalification proceedings in paragraph (7) of article 6 had been deliberately included to rule out a supplier or contractor that had failed to qualify.

31. Mr. TUVAYANOND (Thailand) said that the procuring entity should perhaps be allowed to disqualify a bidder if it had reasonable grounds to believe that the latter was using the provision as a loophole to avoid his responsibilities. But a supplier or contractor should not be disqualified for minor or unintentional errors.

32. Mr. JAMES (United Kingdom) said that the first phrase of paragraph (7) had been included because the question of prequalification was dealt with elsewhere in the Model Law. A bigger problem was the point raised by the observer for the World Bank. As a procuring entity would not discover a defect until the opening of tenders, the drafting group had felt that paragraph (7) as amended by the Commission did not make sense. The Commission had decided that the supplier or contractor should be given the opportunity to make corrections, and therefore it had to decide between the two deadline options proposed in paragraph (7) in square brackets. He himself slightly preferred the first option but had no strong feelings. If neither was acceptable, there was no point in retaining paragraph (7).

33. Mr. PRIESTLEY (Observer for Australia) thought that the policy decided upon the previous week should be adhered to. His question regarding the first phrase of paragraph (7) concerned the situation in which a supplier or contractor had prequalified and submitted a tender which, on being opened, proved to contain materially inaccurate or materially incomplete information. Would that supplier or contractor be given a chance to make corrections? The problem did not arise with the original version of paragraph (7).

34. Mr. AL-NASSER (Saudi Arabia) said that paragraph (7) provided an opportunity for abuse and should be deleted unless a more satisfactory text could be produced.

35. Mr. WALSER (Observer for the World Bank) agreed with the representative of Canada that paragraph (6) (a) should be mandatory and that "may" should be amended to "shall". In regard to paragraph (7), it was a well-accepted principle in public procurement throughout the world that a bid that was not acceptable as submitted could not be made acceptable later. That would be an open door to abuses not in the public interest. A bidder might deliberately provide incomplete information in order to be able to withdraw, or complete the information if he saw it as profitable to remain in the competition. In

(Mr. Walser, observer for the World Bank)

prequalification proceedings, where no money or legal commitment was involved, something like paragraph (7) made sense, but a tender had to be legally binding and provide for a penalty - loss of tender security - in the case of withdrawal.

36. Mr. PEREZNIETO CASTRO (Mexico) supported that position. In his view, the only case in which it would be unjust to rule out the possibility of submitting further information was when such information was not available to or obtainable by the supplier or contractor at the time. The latter could then be given a chance to submit it later.

37. Mr. LEVY (Canada) said that his delegation had come to the conclusion that the Commission should stop trying to be generous to bidders and close off the opportunity to make any corrections whatsoever after the deadline for submission of tenders. Alternatively, the entire paragraph should be deleted.

38. Mr. TUVAYANOND (Thailand) proposed that, instead of the two formulas in square brackets, the word "promptly" be inserted. It should be left to the discretion of the procuring entity to decide whether or not a bidder, particularly if he was the most promising one, should be allowed to remain eligible to execute the contract in a case in which he had made a minor or unintentional error. His delegation was not looking at the question from the point of view of generosity but of the interests of the country. In the course of informal discussions the question of corruption had been raised; in spite of the existence of corruption in many countries, Governments should operate on the presumption of good faith.

39. Mr. KINGA (Cameroon) said that any reputable bidder would be expected to discover his errors between the times of submission and opening of tenders and it should not be necessary to give further time for correction. His delegation was in favour of the proposal to delete paragraph (7) in its entirety.

40. Mr. WALSER (Observer for the World Bank) thought that subparagraph (1) (a) of article 29 covered the case of minor errors raised by the representative of Thailand.

41. Mr. KOMAROV (Russian Federation) said that Thailand's concerns would also be met by paragraph (6) (b) of article 6, which would not authorize disqualification for minor errors. Article 22 dealt with similar questions.

42. Mr. JAMES (United Kingdom) said that, despite those reassurances, the difficulty concerned the potential problem of impermissible conduct on the part of the procuring entity. It had been pointed out that officials of a procuring entity might scrutinize the documentation of tenders that they wished to reject in order to find some technical matter which would justify disqualification. On balance, he felt that paragraph (7) was required, although the wording of the drafting group needed tightening. The proposal to insert the word "promptly" would certainly be acceptable, or a precise deadline of 14 or 28 days might be specified.

43. Mr. WALSER (Observer for the World Bank) thought the text might state that a bidder should not be disqualified for non-material errors provided that the necessary information was submitted either promptly or within a given period, whichever the Commission might prefer.

44. Mr. MORAN BOVIO (Spain) said that the Commission might also consider the possibility of a bidder being allowed to submit incomplete documentation on the undertaking that the documentation would be completed within a certain time period. If necessary a sworn undertaking could be made. That procedure was used frequently in both administrative and judicial proceedings, and would fit in with other proposed formulations. The Commission should in any event try not to be excessively rigid.

45. Mr. PRIESTLEY (Observer for Australia) supported the idea put forward by the representative of the World Bank and suggested a subparagraph (c) of paragraph (6) reading: "A procuring entity may not disqualify a supplier or contractor on the ground that the information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect". It would then be possible to delete paragraph (7).

46. Mr. LEVY (Canada), supported by Mr. RENGER (Germany), said that his delegation preferred the deletion of paragraph (7) because special cases made bad law. It supported the Australian suggestion for a subparagraph (c) of paragraph (6).

47. Mr. WALSER (Observer for the World Bank) said that his delegation also supported the deletion of paragraph (7). It could accept the Australian suggestion with the addition of the words "provided that the supplier or contractor remedies such deficiency promptly on being requested to do so by the procuring entity".

48. Mr. PHUA (Singapore) wondered whether it would be better to retain the original wording of paragraph (7) as set out in the draft Model Law.

49. Mr. JAMES (United Kingdom) asked whether it was proposed that the words "except where prequalification proceedings have taken place" should be kept.

50. It was also necessary to include the words "other than in a case in which paragraph (6) (a) of this article applies", because the procuring entity should in any case be entitled to disqualify a supplier or contractor who gave false information.

51. Mr. PRIESTLEY (Observer for Australia) said that he understood the word "false" in the proposed subparagraph (a) of paragraph (6) to imply deliberate falsehood; a supplier or contractor providing such "false" information should be disqualified.

52. Mr. KOMAROV (Russian Federation) wondered whether application of subparagraphs (b) and (c) would mean that any mistake concerning substance or any inaccuracy or incompleteness, whether formal or concerning substance, would give the right to disqualify the supplier or contractor. The term "materially" did not indicate the scale of the mistake.

53. Mr. PRIESTLEY (Observer for Australia) said that subparagraph (b) concerned an inaccuracy or incompleteness relating to substance. Even a formal mistake relating to substance would be included.

54. Subparagraph (c) was designed to refer to mistakes not relating to substance, so that a procuring entity would be prevented from seizing upon an inaccuracy or incompleteness that was, in reality, of no commercial importance to it.

55. Mr. PHUA (Singapore) said that the Commission had not dealt with the situation where information was accurate but the contractor had not provided proof. That had been the original intention behind paragraph (7).

56. Mr. JAMES (United Kingdom) said that the point made by the representative of Singapore was valid. He wondered whether the Commission was discussing proof or statements about qualifications or both.

57. Mr. WALSER (Observer for the World Bank) wondered whether there was a need to add the words "except where prequalification proceedings have taken place". In his delegation's view, there was no place for those words in the proposed new subparagraph (c).

58. If prequalification had already taken place and it was subsequently found that there was a minor non-material incompleteness in the prequalification submission, that would not be a reason for disqualifying the supplier or contractor.

59. The CHAIRMAN asked the representatives of the United Kingdom and Thailand and the observer for Australia to endeavour to produce a suitable form of words to assist the drafting group.

The meeting rose at 5.05 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.512
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 512th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 16 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

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Consideration of draft Guide to Enactment (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.93 88023 5807E

Distr.: 9 August 1993

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (continued) (A/CN.9/XXVI/CRP.4)

1. The CHAIRMAN invited the Commission to continue its consideration of the amendments to the draft Model Law proposed by the drafting group in its report (A/CN.9/XXVI/CRP.4). Article 6 would be left aside for the time being.

Commentary on article 7, paragraph 1

2. The amendment proposed by the drafting group was adopted.

Commentary on article 7, paragraph 2

3. The additional text proposed was adopted.

Commentary on article 7, paragraph 3, chapeau

4. The proposed text was adopted.

Commentary on article 7, paragraph 4

5. The proposed text was adopted.

Commentary on article 7, paragraph 5

6. The proposed amendment was adopted.

Commentary on article 7, paragraph 8

7. Ms. CLIFT (Observer for Australia) suggested that, at the end of the proposed new text, the words "to the satisfaction of the procuring entity" be added. That would make the meaning clearer.

8. The CHAIRMAN took it that the Commission wished to adopt the new text for paragraph 8 with the amendment suggested by the observer for Australia.

9. It was so decided.

Commentary on article 9, paragraph 1

10. The proposed amendment was adopted.

Commentary on article 9, paragraph 2

11. The CHAIRMAN took it that the Commission wished to correct the reference to take into account the proposed deletion of paragraph 18 (3) and its replacement by new text.

12. It was so decided.

13. The CHAIRMAN said that consideration of the drafting group's report would continue at the next meeting.

Consideration of the draft Guide to Enactment (continued) (A/CN.9/375)

14. The CHAIRMAN drawing attention to the commentary on article 11, took it that the Commission wished to adopt the text on the understanding that the Secretariat would make any necessary changes to reflect relevant decisions of the Commission.

15. It was so decided.

16. Ms. CRISTEA (Observer for Romania) said that comments would presumably be needed on the proposed new article 11 bis.

17. Mr. WALLACE (United States of America), referring to the commentary on article 12, said that it was not clear from the last sentence of paragraph 1 whether the Commission expected that the enacting State would already have an effective system of sanctions against corruption in place, or whether the State was being urged to put such a system in place. Perhaps the text should be amended to say that the State would have an effective system of sanctions in place elsewhere.

18. Mr. TUVAYANOND (Thailand) suggested that the text should also mention the prevention of corruption by personnel of public enterprises responsible for procurement.

19. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 12 on the understanding that the Secretariat would incorporate the changes suggested.

20. It was so decided.

21. Mr. WALLACE (United States of America), referring to the commentary on article 13, said that it should be made clearer, either at that point in the Guide or in the Introduction (paragraph 11), that the Working Group had decided it did not wish to create a hierarchy of procurement methods and that the Commission had a strong preference for tendering proceedings. The great importance of keeping records should be emphasized.

22. In order to ensure that the various procurement methods were understood, explanations should be provided in the Guide and the reasons for decisions relating thereto in the Model Law should be explained.

23. Mr. JAMES (United Kingdom) supported the views of the representative of the United States. In particular, he considered that maximizing economy and efficiency was not the only reason for using tendering proceedings. There should be a reference to the principles contained in the Preamble, and to the fact that tendering best met the requirements of those principles.

24. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 13 on the understanding that the Secretariat would take into

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account the comments of the representatives of the United States of America and the United Kingdom.

25. It was so decided.

26. Mr. FRIES (United States of America), referring to the commentary on article 14, noted the words "the case in which the procuring entity is unable to formulate specifications". Perhaps it should be pointed out that a procuring entity could, if it were not capable of drafting specifications itself, engage experts to do so. That would serve to reinforce the preference for tendering proceedings.

27. Mr. TUVAYANOND (Thailand) suggested that the wording "it is not feasible for the procuring entity to formulate specifications" be used rather than "the procuring entity is unable to ...".

28. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 14 on the understanding that the comments of the representatives of the United States of America and Thailand would be taken into account by the Secretariat.

29. It was so decided.

30. The CHAIRMAN drew attention to the commentaries on articles 15, 16 and 17 and took it that the Commission wished to adopt them.

31. It was so decided.

32. Mr. WALLACE (United States of America), referring to the commentary on article 18, noted that the second sentence of paragraph 1 implied that the procurement law would specify the publications that interested suppliers and contractors should employ. He wondered whether that was likely or indeed whether it would be wise. In the last sentence of paragraph 3, he thought that the suggestion that restricted tendering was appropriate where high-value goods or construction were involved was unfortunate. That example would serve better as an example of circumstances making prequalification desirable.

33. The CHAIRMAN said that the Secretariat would take into account those comments. He took it that the Commission wished to adopt the commentary on article 18 on that understanding.

34. It was so decided.

35. The CHAIRMAN drew attention to the commentary on article 19 and took it that the Commission wished to adopt it.

36. It was so decided.

37. After a brief discussion on the commentary on article 20, the CHAIRMAN said that the Secretariat would make sure that the terminology used in reference to costs of "printing and providing" documents was aligned with the

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Commission's decisions. On that understanding, he took it that the Commission wished to adopt the commentary on article 20.

38. It was so decided.

39. The CHAIRMAN drew attention to the commentary on article 21 and took it that the Commission wished to adopt it.

40. It was so decided.

41. The CHAIRMAN invited comments on the commentary on article 22.

42. Mr. WALLACE (United States of America) asked whether the title of the article was to be changed. He thought that the emphasis was now to be placed on ensuring objectivity and non-discrimination.

43. Regarding the last sentence of paragraph 1, he thought that the argument was unclear and that the sentence should perhaps be recast or deleted.

44. Mr. SAHAYDACHNY (Secretariat) reported that the drafting group had agreed on a shorter title for article 22.

45. Ms. ZIMMERMAN (Canada), referring to paragraph 3, said that the argument put forward in that paragraph seemed to be that, in the case of bilingual documents, suppliers and contractors would have to ascertain that the two language versions were identical. In Canada, both English and French were official languages and solicitation documents would normally be issued in English and French, but that did not mean that the supplier must compare the versions. He could submit the tender in either language. Her delegation took exception to the text of paragraph 3.

46. Mr. KINGA (Cameroon) said that English and French were also official languages in his country. He could not accept the view that the two language versions should not form a single publication. There was no need for contractors to compare the two versions.

47. Mr. MORAN BOVIO (Spain) suggested that it should be made clear that the point made would not apply when the languages concerned were official languages of the country. The Secretariat could undoubtedly find a satisfactory wording for the text.

48. Mr. TUVAYANOND (Thailand) thought that it could be made clear in the solicitation documents in such cases that both language versions were equally authoritative. A reference should perhaps also be made to the need to use a language that was normally used in international trade.

49. Mr. WALLACE (United States of America) said he thought that the draft Model Law adequately took care of the language point in articles 22 (4) and 24. When there were several language versions, the main point was that the tenderer would be fully protected if he based himself on one language version without reference to the others.

50. Mr. LEVY (Canada) suggested that the reference to the need for different language versions to be independent of each other should be deleted.

51. Mr. GRUSSMANN (Austria) supported that suggestion. In any case, he believed that the relevant clause in the draft Model Law would now be not in article 22 but rather in a new article 12 ter.

52. The CHAIRMAN said he thought that there was no need to add anything to paragraph 3. It could be redrafted and the reference to language versions having to be independent could be deleted. The last sentence of paragraph 1 could also be redrafted to give the correct meaning.

53. Mr. WALLACE (United States of America) noted that, to take into account the points raised, it would be necessary also to have another look at the fourth sentence of paragraph 3.

54. The CHAIRMAN suggested that the commentary on article 22 be adopted subject to amendments to take into account the points raised.

55. It was so decided.

56. The CHAIRMAN invited comments on the commentary on article 23.

57. Mr. WALLACE (United States of America) thought that, in the second sentence of paragraph 1, the words "fundamental and necessary" were too strong. He suggested that they be replaced by the word "important".

58. It was so agreed.

59. The CHAIRMAN said he took it that the commentary on article 23 was adopted as amended.

60. It was so decided.

61. The CHAIRMAN invited comments on the commentary on article 24.

62. Mr. TUVAYANOND (Thailand) thought that it would be useful to state that documents should be in a language normally used in international trade.

63. The CHAIRMAN said that the drafting group was proposing that there be a new article 12 ter in the Model Law providing for documents to be issued in a language chosen by the State concerned and in a language customarily used in international trade. If he heard no objection, he would take it that the commentary on article 24 was adopted and that the comment made would be taken into account.

64. It was so decided.

65. The CHAIRMAN invited comments on the commentary on article 25.

66. Mr. FRIES (United States of America) said that the last sentence of paragraph 3 was no longer in line with what the Commission had decided in relation to electronic data interchange (EDI) techniques. With regard to

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paragraph 4, he did not think that a recommendation such as that in the last sentence should be made, since no decision had been taken by the Commission on that point.

67. The CHAIRMAN said that he thought that the last sentence of paragraph 3 should be deleted.

68. Mr. PHUA (Singapore) said that paragraph 2 should include the point that a decision of the procuring entity to extend the submission deadline would not be subject to review under chapter V of the Model Law. He recalled that the text of article 25 (3) had been amended on the proposal of the Australian delegation and that it had been agreed that the point raised should be mentioned in the Guide.

69. After some discussion as to what the Commission's decision had been, Ms. ZIMMERMAN (Canada) said that, according to her notes, it had been suggested that the Guide should mention that the exercise of discretion by the procuring entity in the case under discussion would not be subject to review.

70. The CHAIRMAN said that it seemed reasonable that a discretionary decision could not be subject to review. The Guide would reflect that point. He took it that, subject to the points raised, the commentary on article 25 could be adopted.

71. It was so decided.

72. The CHAIRMAN said that, if he heard no comments on the commentary on article 26, he would take it as adopted.

73. It was so decided.

74. The CHAIRMAN invited comments on the commentary on article 27.

75. Mr. WALLACE (United States of America), referring to paragraph 1, said he thought that the words "at least a portion of" in the second sentence were rather weak and that the drafting could perhaps be looked at. Paragraph 6 would need to be revised to take into account the Commission's decision on the relevant paragraph of the Model Law. In the second sentence of paragraph 6, a better term could perhaps be found than "transferable", which suggested a reference to foreign exchange controls.

76. The CHAIRMAN said that those points would be taken into account. Subject to those points, he took it that the Commission could adopt the commentary on article 27.

77. It was so decided.

78. The CHAIRMAN drew attention to the commentary on article 28 and said that, if he heard no objection, he would take it as adopted.

79. It was so decided.

80. The CHAIRMAN invited comments on the commentary on article 29.

81. Mr. WALLACE (United States of America), referring to paragraph 5, noted that the second, bracketed sentence of that paragraph referred the reader to paragraph 4 (presumably it should be paragraph 2) of the comments under article 8 concerning "the advantages" of using a margin of preference. His delegation would find the expression "factors involved in" more acceptable than "advantages of".

82. In paragraph 6, he suggested that the details given in the last sentence of possible ways of applying a margin of preference might be omitted.

83. Mr. SAHAYDACHNY (Secretariat) said that the intention was to give legislators an indication of the various possibilities in order to draw attention to the fact that the provision in article 29 (4) (d) would not be sufficient in itself and that detailed regulations might be needed.

84. Mr. WALLACE (United States of America) thought that a possibility would be merely to indicate in the Guide that "such matters might be dealt with further in the procurement regulations".

85. In reply to a question from Mr. PRIESTLEY (Observer for Australia), the CHAIRMAN said that the reference to paragraph 4 in the second sentence of paragraph 5 was a mistake; the reference should read "paragraph 2 of the comments to article 8".

86. He suggested that paragraph 5 be amended to refer to the "reasons for" a margin of preference, and that paragraph 6 be retained as an indication to legislators. He took it that the commentary on article 29 was adopted on that understanding.

87. It was so decided.

88. Mr. FRIES (United States of America), referring to the commentary on article 30, said that the concept of an "abuse of right" mentioned in the last sentence of paragraph 1 was not generally applicable in common law jurisdictions and he wondered how it would apply in other legal systems.

89. Mr. HERRMANN (Secretary of the Commission) noted that the text referred to an abuse of right or a violation of fundamental principles of justice. It had not been thought necessary to give an interpretation of those terms; it would not matter if one of the two alternatives did not apply in certain jurisdictions.

90. Ms. CRISTEA (Observer for Romania) said that there had been an example of an abuse of right in her country when three tenders had been submitted and all had been rejected because the procuring entity had wished to make some money and to pocket the tender securities on the pretext of covering costs. There was no law protecting tenderers in Romania, and protection was needed against the abuse of the right to reject tenders.

91. Mr. TUVAYANOND (Thailand) said that the notion of an abuse of right existed in many countries and there should be no problem in accommodating the concerns of all countries.

92. The commentary on article 30 was adopted.

93. Mr. WALLACE (United States of America), referring to the commentary on article 31, suggested the addition of a sentence to cover the point that had been made that another purpose served by prohibiting negotiation was to avoid unnecessarily high prices. Bidders who believed they would be subject to negotiation would artificially inflate their prices to anticipate being driven down in price later.

94. The CHAIRMAN took it that the text could be adopted on the understanding that that point would be reflected.

95. It was so decided.

96. Mr. WALLACE (United States of America), referring to the commentary on article 32, asked the Secretariat to consider redrafting the third, fourth and fifth sentences of paragraph 3. Article 32 dealt solely with the question whether a contract entered into force on notice of acceptance or later, whereas the question of the completeness of the contract was dealt with elsewhere. The present text seemed to confuse those two points. In paragraph 6, he suggested that the words "should be" in the penultimate line be changed to "shall be".

97. The CHAIRMAN took it that the text was adopted on the understanding that those points would be taken into account.

98. It was so decided.

99. Mr. WALLACE (United States of America), referring to the introduction to the commentary on chapter IV, asked whether the word "incorporate" in the third sentence meant "incorporate in the Model Law". If so, the sentence should be made more explicit.

100. The CHAIRMAN said he took it that the text could be adopted on that understanding.

101. It was so decided.

102. The CHAIRMAN drew attention to the commentary on article 33 and said that, if he heard no objections, he would take it as adopted.

103. It was so decided.

104. Mr. FRIES (United States of America), referring to the commentary on article 34, said that the last sentence of paragraph 2 referred rather casually to a potential extra burden for the procuring entity at a time when it was already busy as a reason for not using a wider notification procedure. It might be better to refer to "important administrative difficulties", or something of that nature.

105. The CHAIRMAN said he took it that the text could be adopted on the understanding that that comment would be taken into account.

106. It was so decided.

107. Mr. JAMES (United Kingdom), referring to the commentary on article 35, noted the reference in paragraph 1 to the article being a "skeleton provision". The real point was that the advantage of competitive negotiation was its flexibility, and the provisions in article 35 were as comprehensive as it was appropriate to make them. To call the article a skeleton provision would give the incorrect impression that it should be supplemented by additional regulations.

108. Mr. WALLACE (United States of America) thought that paragraph 3 should also be changed, since the Model Law was to be amended to include a reference to "best and final offers". If such a reference were inserted in paragraph 3, a good deal of the illustrative detail in the paragraph could be dropped.

109. The CHAIRMAN took it that the text could be adopted on the understanding that those comments would be taken into account.

110. It was so decided.

111. Mr. KOMAROV (Russian Federation), referring to the commentary on article 36, recalled that, during the discussion on the article it had been agreed that it would be useful to indicate in the Guide that the procurement entity might use internationally recognized terminology systems such as INCOTERMS.

112. Mr. WALLACE (United States of America) noted that the descriptions under both articles 36 and 37 were minimal. It would be useful for the Guide to include a description in lay language of the seven or eight procurement methods covered by the Model Law in order to ensure that legislators were adequately informed.

113. Mr. PRIESTLEY (Observer for Australia) said he understood that single-source procurement would be subject to article 11 on record requirements and the proposed article 11 bis on the publication of notices of awards; attention should be drawn to those articles under article 37.

114. Mr. JAMES (United Kingdom) felt that it did not do justice to the Model Law to say in article 37 that the reason it did not contain procedures to be followed in single-source procurement was that that method was to be used only in exceptional cases. It had been thought inappropriate to specify procedures because there was no need for the Law to regulate what amounted to a contractual negotiation between the procuring entity and one person. The second sentence should be redrafted.

115. Mr. SAHAYDACHNY (Secretariat), replying to a point raised by Ms. CRISTEA (Observer for Romania), said that the Guide should make clear that the general provisions of the Model Law, where relevant, would be applicable to single-source procurement, so that there was not a total void as far as that procedure was concerned.

116. The CHAIRMAN took it that the commentaries on articles 36 and 37 could be adopted subject to those comments.

117. It was so decided.

118. Mr. FRIES (United States of America), referring to the introduction to the commentary on chapter V, noted that paragraph 7 mentioned that chapter V did not deal with possibilities of dispute resolution through arbitration since the types of situation contemplated did not lend themselves to arbitration. That suggested a more general point which could be elaborated, either in the introduction to the commentary on chapter V or elsewhere, that the Model Law was addressed to contract formation and not to all the issues of contract implementation or administration, including the important one of dispute resolution concerning issues of contract performance.

119. Mr. KOMAROV (Russian Federation) said that it would be useful to add that resolution by arbitration of conflicts between the procuring entity and the contractor was not excluded by the Model Law if it was not prohibited by international laws and treaties.

120. Mr. WALLACE (United States of America) said that arbitration had not been covered during the drafting of the protest provisions. If it was to be said that arbitration was not excluded, it should be made clear that the reference was to circumstances where its use was appropriate. It had been deliberately decided not to make explicit reference to arbitration in the Model Law. The wording of any reference in the Guide should be careful and precise.

121. Mr. KOMAROV (Russian Federation) said that, should a dispute arise, the contractor and the procuring entity should not be deprived of the possibility of concluding an arbitration agreement to resolve it. A reference in the commentary to the existence of such a possibility would be useful.

122. Mr. TUVAYANOND (Thailand) said that in real life resort to arbitration in the matters under discussion was inconceivable. A settlement by arbitration was possible only in the case of a breach of contractual obligation and with the consent of all parties to the dispute. Paragraph 7 was appropriately worded as it stood.

123. The CHAIRMAN said that everyone's concern seemed to be covered in paragraph 7 as it stood.

124. The introduction to the commentary on chapter V was adopted.

125. Mr. WALLACE (United States of America), referring to the commentary on article 38, said that in the second sentence of paragraph 1 the words "as such" could be deleted. The drafting of the third sentence should be looked at. Lastly, the language used in the penultimate sentence of paragraph 1 was less specific than the language adopted for article 38 of the Model Law. It was risky to attempt to paraphrase the Model Law in the Guide and perhaps change the concepts. It was also misleading to refer to "other issues relating to the capacity of the supplier", as though the question of suffering loss or injury related to "capacity", which was a technical term. It might be better to say "other issues, for example those relating to the capacity ...".

(Mr. Wallace, United States of America)

126. Referring to the commentary on article 39, he suggested that the phrase "to ensure that grievances are filed and resolved" in paragraph 3 be amended to read "to ensure that grievances are promptly filed". In paragraph 8, the last sentence should be expanded so as to make clear to the legislator what paragraphs (4) and (5) of article 39 contained.

127. Referring to the commentary on article 40, he suggested that the word "large" be deleted before the word "contract" in the second sentence of paragraph 12, since any contract entered into on the basis of fraud, whether large or small, should be subject to annulment.

128. Referring to the commentary on article 42, he said that the wording of paragraph 4 needed some redrafting, since the reference to an extension up to a "thirty-day total period" was not very clear.

129. Mr. JAMES (United Kingdom), referring to the commentary on article 42, said that there had been a long debate in the Working Group as to whether suspension of proceedings was appropriate: some had argued that, although it had some advantages, it militated against economy and efficiency. He suggested that paragraph 1 reflect that debate and make clear that the text adopted struck a balance between, on one hand, the need to give the supplier or contractor concerned the right of complaint and, on the other, the need to enable the procuring entity to proceed expeditiously, thus promoting economy and efficiency. It was important that that point be made clear to enacting States, since otherwise legislators might wonder why only fairly short time-limits had been provided for.

130. Mr. WALLACE (United States of America) said he could accept that the United Kingdom point should be taken into account, but urged that the Secretariat should take care not to upset the balance reflected in the article, which was the result of a hard-fought battle in the Working Group.

131. The CHAIRMAN took it that the section of the Guide dealing with articles 38 to 43 could be adopted subject to those comments.

132. It was so decided.

133. Mr. WALLACE (United States of America) said that he would like to make some comments on the Introduction to the draft Guide. The Introduction was in some ways akin to an executive summary of a substantial report, and was thus of great importance. His delegation believed that it should be further recast, since it did not give sufficient emphasis to some of the Model Law's most important features. In many ways, the Model Law represented significant progress: for example, it took as its norm international procurement open to contractors and suppliers from all countries, it contained review provisions which had been the subject of much discussion, and were not known in all legal systems, and it provided for various procedures for record-keeping and rights of complaint for aggrieved bidders. Those points should be given more prominence in the Introduction.

(Mr. Wallace, United States of America)

134. The section on administration of procurement (paragraphs 12-16) could be made somewhat more concentrated. His delegation would be glad to submit some suggestions in writing as to how that section could be reformulated.

135. In his delegation's view, the Introduction should try to encapsulate just what it was that the Guide to Enactment sought to do - a matter that had been deliberated at length in the Working Group. For example, it had been pointed out that the Guide could serve as a means of helping executive authorities in States to prepare a section-by-section analysis of the Model Law, indicating to the legislator what policy choices had been made in the course of its preparation. The term "background information" in the second sentence of paragraph 5 was perhaps insufficiently forceful.

136. The CHAIRMAN took it that the Commission wished to adopt the Guide subject to the points raised in the discussion.

137. It was so decided.

138. Mr. WALLACE (United States of America) said his delegation would be pleased to send in to the Secretariat comments and suggestions on the drafting of the Guide, and hoped other delegations would do likewise. Such suggestions would not concern points of substance. Although the Guide had now been adopted, it would be useful for States to have an opportunity to comment on it again once the revised version had been prepared by the Secretariat and circulated to Member States.

139. Mr. MORAN BOVIO (Spain) said that, as he understood it, it had been agreed that, once work on the Guide was completed, delegations could submit any written comments they might have, so that the text could be further improved. He did not think that would in any way affect the decision just taken to adopt the Guide.

140. Mr. LEVY (Canada) said he was not happy with the turn the discussion was taking. The Secretary had already made it clear that, if the Commission were to adopt the Guide now, it would be on the basis that comments already made were to be taken into account and the text reworded accordingly. His delegation had great difficulty with the suggestion that the Secretariat would have to revise the Guide a second time on the basis of written comments submitted after the Guide had been adopted. That would mean that the Commission had in effect not adopted the Guide, and was simply continuing to work on it, which was quite unacceptable to his delegation.

141. The CHAIRMAN stressed that the Commission had adopted the Guide. Comments would be submitted in the context of that decision.

142. Ms. PIAGGI-VANOSSI (Argentina) said she thought that the procedure to be followed had been agreed the previous day. However, in the light of the points that had been made, it might be decided to allow comments to be submitted subsequently.

143. Mr. LEVY (Canada) said it was not clear to him whether, once the Secretariat had incorporated into the text of the draft Guide comments submitted by Governments, the Guide would become final.

144. Mr. BURMAN (United States of America) said his delegation did not share the concern expressed. The procedure proposed was a perfectly proper one, which had been used by the Commission in the past when it had approved a document to which final adjustments still needed to be made. It would not be reasonable to expect the Secretariat to have a fully revised text ready before the end of the session, and the document that had just been considered was clearly not the final version. The text would not be final until after the Secretariat had circulated its revised text for comment by Governments.

The meeting rose at 12.40 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.513
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 513TH MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 16 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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New international economic order: procurement (continued)

Consideration of draft Guide to Enactment (continued)

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V.93 88029 5817E

Distr.: 9 August 1993

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The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Guide to Enactment (continued) (A/CN.9/375)

1. Mr. GRUSSMANN (Austria) said it was his understanding that the Commission had adopted the Guide to Enactment of the Model Law. If the proposal made by the representative of the United States of America at the previous meeting for a written comment procedure leading to a redrafting of the Guide to Enactment were accepted, the resulting text would be a Secretariat rather than a Commission document.

2. Mr. KOUVSHINOV (Russian Federation) supported the views expressed by the representative of Austria. The Guide had been adopted and any further discussion would be of an adopted document. For his country the matter was of considerable practical importance since it was in the process of framing and adopting legislation on tendering. The work of the Commission was highly appreciated by his Ministry of External Economic Affairs; it was of great practical assistance to countries in economic transition.

3. Mr. PRIESTLEY (Observer for Australia) said he shared the views expressed by the representatives of Austria and the Russian Federation, and by the representative of Canada at the previous meeting. The procedure had already been agreed upon. He would not be in favour of the Commission reconsidering its decision to adopt the Guide. Firstly, the procedure proposed by the representative of the United States would cause an indefinite delay in the adoption of the Guide and, secondly, the members of the Commission had been assuming that the procedure would be as outlined by the Chairman. The decision should not be changed at such a late stage.

4. The CHAIRMAN concluded that the Commission did not wish to change its earlier decision. The Guide to Enactment had been adopted and would remain so. Certain additions could be made to clarify points as long as they fell within the parameters of the Commission's decision. When issued in its final form, the Guide to Enactment would be a Commission document.

5. Mr. PHUA (Singapore) asked when the final text of the Guide would be ready.

6. Mr. SAHAYDACHNY (Secretariat) said that the revision of the Guide to reflect decisions taken by the Commission at the present session, including suggested changes and the alignment of the Guide with the final text of the Model Law, could not realistically be expected to be completed earlier than about October. It would be difficult to give a more precise date.

7. Mr. PHUA (Singapore) sought an assurance that the Guide would be precisely as had been decided so that he could report the decision to his Government.

8. The CHAIRMAN said that the Secretariat would make no changes to what had been adopted. He took it that the Commission wished to reconfirm its adoption of the draft Guide to Enactment subject to the agreed changes.

9. It was so decided.

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (continued) (A/CN.9/XXVI/CRP.4/Add.1-4)

Document A/CN.9/XXVI/CRP.4/Add.1

10. The CHAIRMAN invited the Commission to consider the changes to the draft Model Law proposed by the drafting group.

Article 11, paragraph (1) chapeau

11. The text proposed by the drafting group was adopted.

Article 11 (1) (b)

12. The text proposed by the drafting group was adopted.

Article 11 (1) (e)

13. The text proposed by the drafting group was adopted.

Article 11 (1) (k)

14. The changes proposed by the drafting group were adopted.

Article 11 (1) (l)

15. The text proposed by the drafting group was adopted.

Article 11 (2)

16. Ms. ZIMMERMAN (Canada) asked why the provision was subject to article 28 (3).

17. Mr. SAHAYDACHNY (Secretariat) said that the provisions in paragraphs (2) and (3) of article 11 concerning the disclosure of certain portions of the record only after the acceptance of a tender were, as they stood, inconsistent with article 28 (3), which provided that the tender price would be announced at the opening of tenders. The Commission's decision to require a broader notification not limited to the suppliers or contractors engaged in the procurement proceedings had made the cross-references necessary.

18. Mr. AL-NASSER (Saudi Arabia) said that the phrase "be made available to any person after a tender ... has been accepted" was not clear, at least in the Arabic version. He wondered whether the text could be amended to read: "... after acceptance of its tender ... ".

19. Mr. JAMES (United Kingdom) said that the text as drafted was correct, at least in the English version. The paragraph was intended to provide that the portion of the record concerned should be available to the public in general and not merely to suppliers and contractors. To say "its tender" would change the meaning.

20. The CHAIRMAN said that the Arabic text would be amended if necessary and that all language versions would be checked subsequently to ensure their alignment.

21. The new text of article 11 (2) proposed by the drafting group was adopted.

Article 11 (3), chapeau

22. The text proposed by the drafting group was adopted.

Article 11 (3) (b)

23. The text proposed by the drafting group was adopted.

Article 11 (4)

24. Ms. ZIMMERMAN (Canada) suggested that the words "the present article" in the last line be replaced by the words "this article".

25. Mr. HERRMANN (Secretary of the Commission) said that the United Nations generally preferred to say "the present article" in such a case rather than "this article" as the latter might be misleading if, as often happened, the same provision contained a reference to some other article.

26. The new text of article 11 (4) proposed by the drafting group was adopted.

Article 12

27. The text proposed by the drafting group was adopted.

Article 13 (2)

28. The changes proposed by the drafting group were adopted.

Article 14 (1), chapeau

29. The change proposed by the drafting group was adopted.

Article 14 (1) (a)

30. The change proposed by the drafting group was adopted.

Article 14 (1) (c)

31. The change proposed by the drafting group was adopted.

Article 14 (1) (d)

32. The change proposed by the drafting group was adopted.

Article 14 (2), chapeau

33. The text proposed by the drafting group was adopted.

Article 14 (2) (a)

34. The text proposed by the drafting group was adopted.

Article 14 (2) (b)

35. The text proposed by the drafting group was adopted.

Article 15 (1)

36. The change proposed by the drafting group was adopted.

Article 15 (2)

37. The change proposed by the drafting group was adopted.

Article 16, chapeau

38. The changes proposed by the drafting group were adopted.

Article 16 (b)

39. The text proposed by the drafting group was adopted.

Article 16 (c)

40. The text proposed by the drafting group was adopted.

Article 16 (e)

41. The change proposed by the drafting group was adopted.

Article 16 (f)

42. The change proposed by the drafting group was adopted.

Article 16 (g)

43. The change proposed by the drafting group was adopted.

Article 17 (b)

44. Ms. ZIMMERMAN (Canada) said that the words "small quantity and low value" implied that a large procurement of low value would not fall within the scope

(Ms. Zimmerman, Canada)

of article 17 and thus rule out domestic tendering for large quantities of goods of low value. It would be preferable to delete the reference to quantities and refer only to "low value".

45. Mr. JAMES (United Kingdom) said that the wording offered by the drafting group had been intended to cover articles of very high unit value but few in number. On reflection, he agreed with the representative of Canada that the reference to "small quantity" should be deleted.

46. The CHAIRMAN said he took it that there was agreement that the words "low amount or value" in the original text of article 17 (b) submitted by the Working Group would be changed to "low value", rather than to "small quantity and low value" as proposed by the drafting group.

47. It was so decided.

Article 17, last paragraph

48. The change proposed by the drafting group was adopted.

Article 19 (1), chapeau

49. The change proposed by the drafting group was adopted.

Article 19 (1) (b)

50. The text proposed by the drafting group was adopted.

Article 19 (1) (d)

51. The change proposed by the drafting group was adopted.

Article 19 (2)

52. The text proposed by the drafting group was adopted.

Article 21 (g)

53. Ms. ZIMMERMAN (Canada) asked for confirmation that the amendment concerned, proposed by the Secretariat, had been accepted by the Commission.

54. Mr. WALLACE (United States of America) said that he was under the impression that the amendment had not been adopted.

55. Mr. HERRMANN (Secretary of the Commission) replied that according to his notes a number of speakers had supported the Secretariat's text.

56. The CHAIRMAN said he thought there had been no strong objection to the text.

57. The change proposed by the drafting group was adopted.

Article 21 (1)

58. The insertion proposed by the drafting group was adopted.

Article 21 (n)

59. The change proposed by the drafting group was adopted.

Article 22, heading

60. The proposed changes were adopted.

Article 22 (1)

61. The proposed changes were adopted.

Article 22 (2)

62. The proposed change was adopted.

Article 22 (3) (a)

63. Ms. ZIMMERMAN (Canada) said that the amendments made to article 22 reflected the decision of the Commission to move that article to chapter I of the Model Law and to reword the paragraphs so that they would apply both to tendering and to other methods of procurement. Consistent with that change, the phrase "in formulating the specifications" in the third line of article 22 (3) (a) as it appeared in document A/CN.9/371 should read "in formulating any specifications".

64. It was so agreed.

65. The change to article 22 (3) (a) proposed by the drafting group was adopted.

Article 22 (3) (b)

66. The text proposed by the drafting group was adopted.

New article 12 ter (former article 22 (4))

67. Mr. LEVY (Canada) said that, as drafted, the article appeared to require countries like Canada, both of whose official languages were customarily used in international trade, to provide documents in a third language. He suggested that an additional phrase might be inserted in brackets after the words "used in international trade" to make the sense clear.

68. Mr. JAMES (United Kingdom) said that the intention had been to leave the words "and in a language customarily used in international trade" in brackets, as in the original draft in document A/CN.9/371.

69. Mr. SAHAYDACHNY (Secretariat) said that the brackets would have to close at the end of subparagraph (b) for the sense to be as intended.

70. Ms. CLIFT (Observer for Australia) suggested that, in subparagraph (b), the words "small quantity and" be deleted.

71. It was so agreed.

72. With those changes, the text proposed by the drafting group was adopted.

Document A/CN.9/XXVI/CRP.4/Add.2

Article 6 (1) and (2)

73. Mr. WALLACE (United States of America) wondered whether the new mandatory language of subparagraph (1) (b) was compatible with the provision in article 34 (9) (d).

74. Mr. JAMES (United Kingdom) said that making qualification mandatory for all procurement procedures meant that a test of unreliability or incompetence was no longer needed in article 34, and that consequently article 34 (9) (d) could be deleted.

75. Mr. PRIESTLEY (Observer for Australia) endorsed that suggestion.

76. Mr. LEVY (Canada) said that, while article 34 (9) (d) might be redundant for lawyers and other experts, it did not conflict in any way with article 6 (1) (b). Rather it made it quite clear what the rules were, and should therefore be retained.

77. Mr. WALLACE (United States of America) said that it would be bad practice to retain article 34 (9) (d), because its meaning could be queried.

78. The CHAIRMAN said that, if there were no strong objections, he would take it that the Commission agreed to delete article 34 (9) (d).

79. It was so decided.

80. The text proposed by the drafting group for article 6 (1) and (2) was adopted.

Article 6 (3)

81. Ms. ZIMMERMAN (Canada) said that a further amendment to the text as it appeared in document A/CN.9/371 was needed in order to ensure that the provision applied to other documents used in soliciting offers or proposals as well as prequalification and solicitation documents.

82. Mr. SAHAYDACHNY (Secretariat) thought that that concern might be met if the text were amended to read: "... prequalification documents, if any, the solicitation documents or any other documents used to solicit offers or proposals and shall apply equally ...".

83. Ms. ZIMMERMAN (Canada) suggested that the paragraph might also be worded along the lines of article 22 (3) (a) as just adopted.

84. Mr. JAMES (United Kingdom) said that the same amendment would need to be made in article 6 (4).

85. It was agreed that the drafting group would decide on the most appropriate wording.

86. On that understanding, article 6 (3) was adopted.

Article 11 (1) (i)

87. The Commission agreed to the deletion of the subparagraph.

Article 11 bis

88. The proposed text was adopted.

Article 13 (2)

89. The proposed change was adopted.

Article 13 bis

90. Mr. JAMES (United Kingdom) said he thought that the end of subparagraph (a) should read as follows: "suppliers or contractors; or".

91. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that it had been his delegation's impression that the word "significantly" was to be inserted before "disproportionate" in subparagraph (b).

92. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had considered the insertion of "significantly" and decided against it.

93. The text proposed by the drafting group was adopted.

Article 18 (3)

94. It was agreed to delete the paragraph.

Article 19 (1) (d)

95. The proposed change was adopted.

Article 25

96. The CHAIRMAN invited the Commission to take up article 25 (3), which was not dealt with in the drafting group's report.

97. Mr. SAHAYDACHNY (Secretariat) reminded the Commission that it had decided to refer, in subparagraph (3), to "the absolute discretion" of the procuring entity, a matter which had been unintentionally passed over by the drafting group. Article 25 (3) should begin with the following wording: "The procuring entity may, in its absolute discretion".

98. It was so decided.

99. Mr. PRIESTLEY (Observer for Australia), referring to article 25 (1), recalled that his delegation had suggested the inclusion of a reference to the location for the submission of tenders in that paragraph. The Canadian delegation had produced a proposed wording which had been adopted by the Commission.

100. Mr. LEVY (Canada) said that his delegation had proposed the following wording: "The procuring entity shall fix a specific date and time as the deadline for and the location for the submission of tenders".

101. Mr. SAHAYDACHNY (Secretariat) suggested the following wording for the end of the sentence: "deadline for, and the place for, the submission of tenders".

102. Mr. WALLACE (United States of America) thought it would be better to mention the place before the date and time.

103. The CHAIRMAN took it that it was agreed that the wording of article 25 (1) would be changed along those lines.

104. It was so agreed.

105. The text proposed by the drafting group for article 25 (5) was adopted.

Article 26 (1)

106. The proposed change was adopted.

Article 26 (2) (b)

107. The proposed change was adopted.

Article 26 (3)

108. The proposed change was adopted.

Article 27 (1) (b)

109. The proposed text was adopted.

Article 27 (1) (c)

110. The proposed change was adopted.

Article 27 (1) (d)

111. The proposed change was adopted.

Article 27 (1) (e)

112. The proposed changes were adopted.

Article 27 (1) (f) (i)

113. The proposed change was adopted.

Article 27 (2)

114. The proposed change was adopted.

Article 27 (2) (b)

115. The proposed change was adopted.

Article 27 (2) (d)

116. Mr. JAMES (United Kingdom) said he thought that the word "such" should be added before the words "withdrawal is permitted".

117. The proposed new text was adopted.

Article 29 (1) (b)

118. The proposed text was adopted.

Article 29 (4) (d)

119. The proposed change was adopted.

Article 29 (5)

120. Ms. CRISTEA (Observer for Romania) said she thought it had been proposed that the text should read: "For the purposes of comparing and evaluating tenders, the tender prices of all tenders shall be converted to the same currency".

121. Mr. OLIVENCIA RUIZ (Spain) said that the wording had been discussed by the drafting group, which had preferred the form of words indicated.

122. The change proposed by the drafting group was adopted.

Article 29 (6)

123. Mr. WALLACE (United States of America) wondered whether the proposed change had any implications for other articles.

124. Mr. SAHAYDACHNY (Secretariat) noted that the wording "to demonstrate again" had already been adopted in article 7 (8).

125. The changes proposed in article 29 (6) were adopted.

Article 29 (7)

126. The proposed change was adopted.

Article 31

127. The proposed change was adopted.

Article 32 (3)

128. The proposed change was adopted.

Article 32 (6)

129. The proposed change was adopted.

Article 32 bis

130. The proposed text was adopted.

Article 34

131. The proposed changes were adopted.

Article 35 (4)

132. The proposed change was adopted.

Article 36 (3)

133. The proposed text was adopted.

Article 38 (2) (c)

134. It was agreed to delete the subparagraph.

Article 38 (2) (d)

135. The proposed change was adopted.

Article 38 (2) (e)

136. Mr. JAMES (United Kingdom) said that the text of the proposed new subparagraph (f) should read "an omission referred to in article 21 (s)".

137. The proposed additional text was adopted.

Document A/CN.9/XXVI/CRP.4/Add.3

138. Mr. WALLACE (United States of America) wondered whether the provisions of article 6 also covered prequalification. If the procuring entity had excluded a tenderer at the prequalification stage on the basis of what it deemed to be a material inaccuracy or incompleteness, which was not promptly remedied, would the tenderer have recourse at the subsequent document solicitation stage?

139. Mr. JAMES (United Kingdom) said he thought there was no real difficulty. Article 6, paragraph (6), applied to all qualifications, including prequalifications. The effect of the new subparagraph (c) was that, in prequalification proceedings, a prospective supplier or contractor could not be eliminated for providing information which was incomplete or inaccurate in a non-material sense, provided it remedied the deficiencies promptly upon request. If a procuring entity examining the response to its invitation to prequalify found that the qualifications of one of its potential suppliers were deficient in a material sense, it could disqualify such a supplier under article 6, paragraph (6) (b). However, if the information was incomplete in a non-material sense, the procuring entity could not disqualify the supplier if the latter remedied the deficiency promptly. The procuring entity must therefore ask the supplier, at the relevant time, to provide the missing information. If it failed to do so, article 6, paragraph (6) (c), would not apply, so there was no likelihood of a supplier claiming, two years later, that the information given had been complete in all but non-material respects. Theoretically, a problem could arise if the procuring entity failed to identify the deficiency at the relevant time; but in that case it could ask the supplier to requalify.

140. Mr. GRIFFITH (Observer for Australia) said that, if the information was incomplete in a non-material respect, nobody would take the trouble to remedy it. As drafted, article 6, paragraph (6) (c), failed to cover the situation where there was no request by the procuring entity to remedy the deficiency. In that event, there was no means of disqualifying the supplier. However, there was no need for the text to deal exhaustively with non-material inaccuracies, and the provision could perhaps be deleted.

141. Mr. SAHAYDACHNY (Secretariat) said that the intention in article 6, paragraph (6) (c), was to establish the rule that a procuring entity could not disqualify a supplier or contractor for non-material defects in the information presented for qualification, subject to the obligation on the part of the supplier or contractor to correct such defects if requested to do so. For the sake of clarity, he suggested replacing the words "provided that" by "unless" and the word "remedies" by "fails to remedy".

142. Mr. GRIFFITH (Observer for Australia) said that the new text appeared to be dealing with two issues at once: the obligation on the supplier or contractor to remedy defects on request, and the prohibition against disqualification for non-material deficiencies. Those points should perhaps be expressed in separate sentences. He suggested starting a new sentence after "non-material respect", to read "The supplier or contractor shall remedy such deficiencies promptly upon request by the procuring entity".

143. Mr. LEVY (Canada) said that there would be a problem of interpretation in the event that the supplier or contractor failed to remedy the deficiencies. Apparently, it would not be disqualified for failure to do so. He suggested replacing the words "provided that" by "if", keeping the two sentences together.

144. Ms. CRISTEA (Observer for Romania) suggested the formula: "... in a non-material respect, in which case the supplier or contractor is obliged to remedy such deficiencies promptly upon request by the procuring entity".

145. Mr. WALLACE (United States of America) said that the paragraph should then continue: "and shall be disqualified if it fails to do so".

146. Mr. GRIFFITH (Observer for Australia) said that the two rules contained in the subparagraph must be kept separate. Even if there was no request from the procuring entity, an issue of disqualification might still arise.

147. Mr. JAMES (United Kingdom) agreed that the draft was silent on the consequences of failure by a supplier or contractor to comply with a request by the procuring entity to supply deficient information. However, the Commission appeared to feel that even in the case of non-material deficiencies, the procuring entity should be able to disqualify a supplier or contractor that failed to remedy the deficiency promptly upon request. That could be achieved by starting a new sentence after "non-material respect" reading "A supplier or contractor shall be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity".

148. Mr. GRIFFITH (Observer for Australia) suggested replacing "shall" by "may". The disqualification should be at the discretion of the procuring entity.

149. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the United Kingdom delegation with the change suggested by the Australian delegation.

150. It was so decided.

151. The changes proposed by the drafting group in document A/CN.9/XXVI/CRP.4/Add.3, as amended, were adopted.

152. Ms. ZIMMERMAN (Canada) expressed appreciation on behalf of the Commission for the efforts of the drafting group.

Arrangements for publication of the Model Law and Guide to Enactment

153. Mr. KOMAROV (Russian Federation) noted that the Commission had not yet decided how to link the text of the Model Law with the text of the Guide.

154. The CHAIRMAN said the Commission needed to decide whether the Model Law should be published in combination with the Guide, or separately, and how the texts should be presented.

155. Mr. MORAN BOVIO (Spain) asked the Secretariat for some guidance on the matter.

156. Mr. HERRMANN (Secretary of the Commission) said that the full text of the Model Law would be submitted to the Commission at the end of its session as an annex to the draft report. The revised draft Guide would be issued later as an ordinary document.

157. Mr. GRIFFITH (Observer for Australia) said that the text of the Model Law could usefully be prefaced by parts of the Guide as prepared by the

(Mr. Griffith, Observer for Australia)

Secretariat, for instance paragraphs 1 to 4 and 9 to 20, explaining the history and purpose of the Model Law. The Guide should, however, appear as a separate publication.

158. Ms. DODSWORTH (United Kingdom) said her delegation would be happy for the Model Law and the Guide to appear as two separate United Nations documents, according to standard practice.

159. Mr. SOLIMAN (Egypt) suggested annexing the Guide to the text of the Model Law.

160. Mr. MORAN BOVIO (Spain), supported by Mr. GRUSSMANN (Austria), thought the question whether and how to combine the two texts could be left to the Secretariat.

161. Mr. KOMAROV (Russian Federation) said that users of the Model Law would expect to have recourse to the Guide. The question was, therefore, how the Guide could be made readily available.

162. Mr. HERRMANN (Secretary of the Commission) said the Secretariat would add to the cover page of the Model Law a footnote referring to the existence of the Guide. He pointed out that, owing to the severe financial constraints under which the United Nations was currently operating, there were no funds available for special publications, unless Governments wished to contribute for that purpose.

163. Mr. KOUVSHINOV (Russian Federation) said that the Guide did not contain specific interpretations of each article of the Model Law. It could therefore be issued separately.

164. Mr. WALLACE (United States of America) suggested that the Guide be issued in a simple, stapled form. He agreed, however, that the form of publication of the Model Law and the Guide was a matter for the Secretariat to decide.

165. The CHAIRMAN said he thought it was the Commission's wish that the Model Law and the Guide should be issued as United Nations documents, with appropriate cross-references.

166. Mr. SAHAYDACHNY (Secretariat) suggested that the Commission might wish to adopt the Model Law by means of a formal resolution. The Secretariat could draft a resolution for consideration by the Commission later in the session.

167. It was so agreed.

The meeting rose at 5.05 p.m.